BOOK REVIEW

THE SUPREME COURT AND THE CHALLENGE OF PROTECTING MINORITY RELIGIONS IN THE UNITED STATES: REVIEW OF GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL

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"If we are serious about the free exercise of religion, we should protect free exercise whenever we can, by protecting sincere religion in most cases even if we realize that human error will prevent us from protecting it in all cases."[1]

I. INTRODUCTION

The Free Exercise Clause of the United States Constitution protects against abridgment of the "free exercise" of religion.[2] Like other guarantees in the Bill of Rights,[3] the clause initially limited only the national

1. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 882, *available at* http://www.religion-online.org/showarticle.asp?title=886.

2. U.S. CONST. amend. I (stipulating "Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise* thereof") (emphasis added).

3. The Bill of Rights consists of the first ten amendments to the United States Constitution. These amendments encompass a multiplicity of guarantees that include freedom of religion, speech, press, association, and assembly (First Amendment); right of freedom from unreasonable searches and seizures (Fourth Amendment); freedom from self-incrimination and double jeopardy and due process (Fifth Amendment); rights of accused persons in criminal prosecutions (Sixth Amendment); and right against cruel and unusual punishments (Eighth Amendment), among other guarantees. Although integrated into the Con-

government, but became applicable to the states in 1940 in *Cantwell v. Connecticut*,[4] wherein the Supreme Court incorporated free exercise protection against the States.[5] Lawsuits brought under this clause "almost always concern individuals or small groups whose beliefs differ from those of their neighbors."[6] The Free Exercise Clause is one of two protections relating to religion under the First Amendment to the United States Constitution. The other is the Establishment Clause,[7] which, like Free Exercise, initially limited only the national government, but was applied to the states in 1947. The tool of that incorporation was *Everson v. Board of Education*.[8] The "touchstone" of the Establishment Clause is "the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non[-] religion."[9]

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stitution, the Bill of Rights was ratified in 1791, four years after the ratification of the main document in 1787.

4. 310 U.S. 296 (1940) (invalidating the conviction of a Jehovah's Witness punished for inciting a breach of the peace by proselytizing on the streets of New Haven, Connecticut).

5. *See id.* at 303 (stating that "the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."). Six years earlier, in *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245 (1934), involving a religious objection challenge by two Methodist students, the Court implicitly agreed that the principle of free exercise must afford protection to outward manifestations of religious beliefs. *See id.* at 262. Note, as already hinted in the excerpt above from the *Cantwell* case, that the tool used to incorporate this and other guarantees against the states is the Fourteenth Amendment's Due Process clause. U.S. CONST. amend. XIV (forbidding the States from "depriv[ing] any person of life, liberty, or property, without due process of law"). The clause basically forbids unreasonable or arbitrary government action and requires the government to follow the appropriate procedures in formulating and implementing its policies. *See* KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 484 (8th ed. 2005).

6. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 113 (The Notably Trials Library 2005) (2001).

7. U.S. CONST. amend. I (stipulating that "Congress shall make no law respecting an establishment of religion").

8. 330 U.S. 1 (1947) (upholding a New Jersey statute which authorized local school districts to make rules and contracts for the transportation of children to and from schools). In *Everson*, the Supreme Court proclaimed that "[t]he First Amendment has erected a wall between church and state" that "must be kept high and impregnable" with no allowance for "the slightest breach." *Id.* at 18. Yet, as suggested already, the Court found that New Jersey had *not* breached that wall. *Id.* Justice Souter recently praised *Everson* as the decision "which inaugurated the modern era of establishment doctrine." Zelman v. Simmons-Harris, 536 U.S. 639, 687–88 (2002) (Souter, J., dissenting).

9. Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (internal quotations omitted). For a most recent interpretation of the clause, see McCreary County v. ACLU of Kentucky, 545 U.S. 844, 860 (2005) (O'Connor, J., concurring) (stating when the government favors a particular religion, it "sends the . . . mes-

The Religion Clauses are like two sides of a coin that necessarily complement each other. The first, the Establishment Clause, forbids the government from sponsoring an official religion. The second, the Free Exercise Clause guarantees against federal and state infringement of religious practices.[10] The two clauses "reflect the Framers' vision of an American Nation free of the religious strife that . . . long plagued the nations of Europe."[11] However, although they "express complementary

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sage to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members") (internal quotations omitted).

10. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 113 (The Notably Trials Library 2005) (2001). In bifurcating, as it does, its provisions relating to religion, the United States sets itself apart from many other countries and international organizations like the United Nations, which unify those provisions. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 3, U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR] ("[E]veryone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom . . . to manifest his religion or belief in teaching, practice, worship and observance."); International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *available at* http://www1.umn.edu.humanrts/instree/b3ccpr.htm [hereinafter ICCPR] (using virtually similar language and provisions as the UDHR).

11. Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting). Justice Breyer explains that, collectively, the clauses "embody an understanding, reached in the [seventeenth] century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to worship God in their own way, and allows all families to teach their children and to form their characters as they wish." *Id.* (citing C. RADCLIFFE, THE LAW AND ITS COMPASS 71 (1960)) (internal quotations omitted); *see also id.* at 686 (Stevens, J., dissenting) ("Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of democracy."). Consistent with these viewpoints, "freedom of every person to worship God in his own way—everywhere in the world," was one of Four Freedoms President Franklin D. Roosevelt announced would form the basis for peace and security in the post-World War II international order. *See* ERIC FONER, VOICES OF FREEDOM: A DOCUMENTARY HISTORY 158–60 (2005). After the War, the Roosevelt administration helped found the United Nations system under whose tutelage, an international bill of human rights has evolved providing for protection of not only freedom of worship in a general sense but also of minority religions. *See* UDHR, G.A. Res. 217A, at 3, U.N. Doc. A/810, at 71 (1948) (relating to freedom to worship generally); ICCPR, G.A. Res. 2200A, at 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (regarding protection of minority religions, providing "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language"). The nature of the tie of the Religious Clauses to social stability exists in the manner of a concern that governmental sponsorship of official religion or unconstitutional abridgement of religious practices poses a "threat" of religious "divisiveness," specifically "political divisions along religious lines," that could harm "the normal political process." *See* Zelman v. Simmons-Harris, 536 U.S. 639, 719 (2002).

values,"[12] the two clauses are also, simultaneously, "frequently in tension,"[13] a factor, not surprisingly, accounting for their high litigiousness.[14] The First Amendment, by its literal language, enjoins a strict separation between religion and the government,[15] that the Supreme Court rarely, if

12. Cutter v. Wilkinson, 544 U.S. 709, 718–19 (2005) (holding that section three of the Religious Land Use and Institutionalized Persons Act of 2000, RLUIPA, discussed *infra* Part 111.D., does *not* violate the Establishment Clause of the United States Constitution).

13. Locke v. Davey, 540 U.S. 712, 718–19 (2004) (upholding against challenge as "presumptively unconstitutional" a Washington State program which funds training for all fields of study, except theology); *see also* Walz v. Tax Comm'n of New York, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to logical extreme, would tend to clash with the other."). Likewise, several scholars have commented on the same tension; *see* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1020 (1998) (stating, somewhat dramatically, that the United States Constitution "tries both to build a shrine of free exercise for unknown gods and to confine them in it by prohibiting establishment"); *see also* Mary H. Mitchell, Professor Ind. Univ. Sch. of Law, Seminar in the Law of Church and State (Summer 2006) (stating that the Establishment Clause prohibits exemption for religious reasons, whereas the Free Exercise Clause requires such exemption, with a "zone of permissible accommodation" in between that the government must tread creatively).

14. *See* STEVEN G. GEY, RELIGION AND THE STATE iii (2001) (stating that the Religion Clauses "are among the most frequently litigated in the United States Supreme Court, and generate more than their share of high-profile constitutional disputes in the lower courts").

15. *Id.* As Professor Gey explains, the Establishment Clause forbids government favoritism of religion as well as "government actions respecting an establishment of religion." *Id.* A literal reading of this clause would forbid a State's efforts, even indirectly, to endorse or aid religious practices or beliefs. *See id.* Similarly, the text of the Free Exercise Clause contains separatist overtones. The clause suggests that government action which restricts religious exercise should be upheld by the courts, so long as the restrictions do not "prohibit the free exercise thereof." *Id.* But modern courts do not take this approach, otherwise the United States would erect a "wall of separation" between church and state as Thomas Jefferson advocated in his letter to the Danbury Baptists Association in 1802. *Id.* (citing Letter from Thomas Jefferson, to the Danbury Baptist Association (Jan. 1, 1802) (reprinted in STEVEN G. GEY, RELIGION AND THE STATE 29 (2001)). For Supreme Court Justice Black, well-known for his insistence on a literal interpretation of the First Amendment, "no law" relating to religion meant literally NO law. *Id.* Under this severely literal interpretation, which never found majority support on the Supreme Court, "courts would be obligated to strike down any law having the slightest tendency to favor religion, and would likewise be obligated to uphold any law restricting religious practice, unless that law had the effect of outlawing the practice altogether." *Id.* Another way to look at the Religion Clauses, as Professor Mitchell teaches, is that the Establishment Clause prohibits exemption for religious reasons, whereas the Free Exercise Clause requires such exemption, with a "zone of permissible accommodation" in between that the government must tread creatively. Mary H. Mitchell, Professor Ind. Univ. Sch. of Law, Seminar in the Law of Church and State (Summer 2006).

ever, applied.[16] The brevity of the First Amendment (a mere sixteen words framing two clauses), plus the difficulty of literally interpreting the clauses, has led to a situation whereby the Court goes beyond the text of the First Amendment, in seeking "to define the proper limits of the relationship between church and state."[17] However, this occurrence can work a Catch-22 for the Court: it thrusts "interpretive issues . . . at the forefront of Religion Clause litigation,"[18] which, in turn, creates "inconsistencies in the Court's own treatment of church/state issues."[19]

No case typifies these inconsistencies more than *Employment Division v. Smith,*[20] "the mother document of a radically new interpretation of the" Free Exercise Clause,[21] and the decision that forms the cynosure of the book under review. In *Smith II*,[22] a five-member majority of the Court both "rewrote the entire jurisprudence of the Free Exercise Clause, leaving it a much narrower guarantee than had previously been thought[,]"[23] and interpreted the same clause as a matter of "majoritarian rule rather than a protection of individual conscience."[24] The case illustrates like no other, what Garrett Epps calls "the quality of tragedy," that sometimes takes place when "[t]wo opposed rights come into conflict,

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16. *Id.* Instead, in interpreting the clauses, as Professor Gey conveyed, "the Court has vacillated between a moderately separationist interpretation . . . and a more lenient approach that permits—and sometimes requires—government action accommodating religious belief and practice." *Id.*

17. *Id.* This is the boundary Professor Mitchell denominates a "zone of permissible accommodation," sandwiched between the Establishment Clause's prohibition of religious exemption and the Free Exercise Clause's requirement of such an exemption. Mary H. Mitchell, Professor Ind. Univ. Sch. of Law, Seminar in the Law of Church and State (Summer 2006).

18. *Id.*

19. STEVEN G. GEY, RELIGION AND THE STATE iv (2001); *accord* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 515–16 (2001) ("No area of modern law . . . has been so marked by sectarian struggle, so strained by fundamental fissures, so reflective of deep American doubts and aspirations" than the Religion Clauses).

20. 494 U.S. 872 (1990). I presume that it is this very same case that Professor Gey was adverting to when he wrote that "[i]n the Free Exercise area, a [c]ourt that is viewed as increasingly friendly to religious practitioners is nevertheless also responsible for virtually eviscerating Free Exercise Clause protections against generally applicable governmental restrictions that impinge on religious practices." STEVEN G. GEY, RELIGION AND THE STATE iv (2001).

21. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 2 (The Notably Trials Library 2005) (2001).

22. 494 U.S. 872 (1990).

23. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1015 (1998).

24. Nat Hentoff, *Justice Scalia vs. The Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25.

and one destroys the other," with the result, in the end, that "both suffer loss."[25]

The book under review joins a growing list of scholarship on the case,[26] yet departs from existing studies in that, rather than focusing on the decision itself, the book unveils the "hidden history,"[27] like the "faces and scenes . . . that courts and judges were too busy and too important to understand,"[28] underlying the avalanche of news headlines and legal commentaries relating to the case. The journey began in 1994 when, once he concluded that the *Smith* decisions made "a good case for historical research,"[29] Epps (then an associate professor of law at the University of Oregon School of Law) set out to find and document the actual people and decisions that precipitated the decision.[30] His methodology of choice was the historical method, specifically "oral interviews designed to supplement and illuminate the written record."[31] To justify his use of this methodology, Epps stated that oral history can "elicit the kind of information often omitted by those who prepare written documents," while at the same time addressing the problem of "distortions" relating to the study of constitutional litigation in America that historian Morton J. Horwitz criticized.[32] Versions of Epps's extensive study of religious freedom

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25. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1021 (1998) (quoting 1 G.W.F. Hegel, Lectures on the History of Philosophy 446 (E.S. Haldane trans. Univ. of Neb. Press 1995)).

26. *See, e.g.,* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF *Oregon v. Smith* (2000); Carolyn Nestor Long, Religious Freedom and Indian Rights: The Case of *Oregon v. Smith* 196–99 (2000); Garrett Epps, To an Unknown God: Religious Freedom on Trial 277 (The Notably Trials Library 2005) (2001) (disclosing that Galen Black, co-plaintiff in the *Smith* case, is "at work on his own memoir" related to the dispute, that if and when it comes out, will add to the building literature on the decision).

27. See Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1015 (1998) for the use of the phrase "hidden history." The piece is an integral part of the published result of Epps's general study on religious freedom.

28. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 259 (The Notably Trials Library 2005) (2001).

29. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 953 (1998).

30. *Id.* at 957.

31. *Id.; see* also PAUL THOMPSON, THE VOICE OF THE PAST: ORAL HISTORY (2d 1988) (inspiring Professor Epps's methodology, as the authority on oral history).

32. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 957–58 (1998). Horwitz wrote, "Not only do traditional constitutional histories include a large number of atypical 'great cases' but constitutional cases are also unrepresentative either as intellectual history or as examples of social control . . . But another, more crucial, distortion has been introduced by the excessive equation of constitutional law with 'law.'" *Id.* (quoting MORTON J. HORWITZ,

appeared as articles and presentations both before and since publication of this book. Versions published *before* the appearance of the book include two law review articles, one on the case referenced repeatedly in this book review,[33] and another, focusing on the Religious Freedom and Restoration Act (analyzed in Part III below),[34] as well as a presentation to "a work-in-progress seminar at the Western Law Teachers of Color Annual Meeting in March 1998."[35] The only available work related to Epps's study of religious freedom that has been published since the book's appearance is a chapter in a text released in 2004.[36]

The major players in the *Smith* lawsuit, or "protagonists," as Epps melodramatically denominates them, are Al(fred) L. Smith, Jr., a native American; Galen Black, a Caucasian; the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), the nongovernmental organization Smith and Black worked for as counselors; and David B. Frohnmayer, then Attorney General of Oregon. Studies have been written about unlikely litigants who make constitutional law.[37] The *Smith* case is one of those instances. The parties in *Smith* had no inkling they were participating in something that, in the end, would put their otherwise bland names in the annals of constitutional history.[38] Both Black and Smith had troubled upbringings and broken marriages. Both were also recovering alcoholics trying to turn a new chapter in their lives after years of alcohol abuse. In addition, Smith was marrying again and, at the ripe age of sixty, starting a new family that he needed to support. When the second *Smith* case was decided in 1990, Al Smith was

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THE TRANSFORMATION OF AMERICAN LAW, 1780-1790, at xii (1997)). Here too Epps tells us oral history proved beneficial. It "revealed a wealth of information that the official record does not disclose[,]" including the fact, for example, that the case originated "as a dispute less about religion than about the proper treatment philosophy for recovering alcoholics-particularly Native American alcoholics[,]" and "that each of the major players in the case saw it quite differently from the others." *Id.* at 958. This point is elaborated upon *Infra* Part IV.C., highlighting the significance of the book. *Infra* Part IV.C.

33. *Id.* at 953–1021.

34. Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998).

35. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 953 (1998).

36. GARRETT EPPS, THE STORY OF AL SMITH: THE FIRST AMENDMENT MEETS GRANDFATHER PEYOTE, IN CONSTITUTIONAL LAW STORIES (2004).

37. JOHN A. GARRATY, QUARRELS THAT HAVE SHAPED THE CONSTITUTION (1987).

38. *See id.* (Michael Dorf, Constitutional Law Stories (2004) (citing Garrett Epps, THE STORY OF AL SMITH: THE FIRST AMENDMENT MEETS GRANDFATHER PEYOTE). The reference to bland name has particular meaning for Al Smith, who worried that because he did not have an Indian name, he would arrive in the spirit world after his death and the spirit people would not recognize his arrival. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 10 (The Notably Trials Library 2005) (2001).

nearly seventy years old. In short, none of the co-plaintiffs, more so Smith, was prepared for the economic and psychological aggravations of a lawsuit at that point. A socioeconomic world separated Frohnmayer from Smith and Black; unlike the duo, Frohnmayer "early in life established a pattern of success that has hardly been broken since."[39] Yet, arguably even Frohnmayer's involvement in the lawsuit was unlikely. Every lawsuit has it's complementing sides. The two sides to this lawsuit were Smith and Black, both of them co-plaintiffs. The "natural" defendant in the lawsuit was ADAPT, the nongovernmental agency that opposed the unemployment compensation for the two plaintiffs. Frohnmayer's participation in the case was fortuitous. The Attorney General's Office, which Frohnmayer headed, became involved because it advised the Employment Division, to which the plaintiffs made their claim for benefits.[40] It was an advisory role Frohnmayer took seriously.[41]

This book review provides an extended review of Epps's book. It has four parts, in addition to this introduction and a conclusion. Part II presents the facts and holding of *Smith,* along with a post-mortem. Part III articulates and discusses four aftermaths of *Smith,* including the passage of Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 not covered in the Epps's study. Part IV highlights the importance of Professor's Epps's scholarship on the *Smith* cases, including three lessons that bear on the significance of that research. Part V comments on the recognition to Epps resulting from the book.

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39. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 966 (1998).

40. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 143 (The Notably Trials Library 2005) (2001) (stating that, in discharging its responsibilities in this lawsuit, the Attorney General's Office acted more out of its concern for the "state's unemployment system, its constitution, and its drug laws," than for the possible effect that granting unemployment benefits to Smith and Black would have on ADAPT or its philosophy of treatment).

41. *Id.*

> From the day he was elected, Dave Frohnmayer had insisted that state agencies regard his office as *the* law firm for the state. The state should speak with one legal voice, he said. That was because the issue in any given case was not simply what would be best for the state agency involved but what would be best for the state of Oregon as a whole. Legal positions taken by one agency could compromise the state's general interests down the road, and so they needed to be reviewed by the A[ttorney] G[eneral], who was trying to think ahead of all the pending and possible issues that could be affected by a given case. The AG's role . . . is a bit like that of a chess master, who must not be distracted by the current threat or opportunity and thus neglect the possibility of a strategic disaster many moves away.

Id. at 119–20.

II. THE *SMITH* CASE

A. *Facts, Holding, and Opposition Within the Court to Smith*

Smith and Black worked for ADAPT, a private drug rehabilitation agency located in Roseburg, Oregon, and were fired for ingesting peyote as part of a Native American church service or religious ceremony.[42] At the time of this lawsuit, peyote was classified as an illegal drug in most

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42. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, *available at* http://www.religion-online.org/showarticle.asp?title=886. Peyote or mescal, known botanically as *Lophophora Williamsii Lemaire*, is a small spineless cactus that grows in southwest Texas and northern Mexico. *Id;* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 59–60 (The Notably Trials Library 2005) (2001). The plant creates tubers or buds, called buttons, which have hallucinogenic components. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, *available at* http://www.religion-online.org/showarticle.asp?title=886. The qualities of Peyote buttons, extremely bitter, difficult to chew and to swallow, limit the popularity of peyote as a recreational drug. *See id.* at 878, 882. Native Americans have used peyote for religious or church services going back to the mid-sixteenth century when the practice was first described in Spanish records. *Id.* at 877. One legend that developed around this plant is that a Native woman, without food and water wandering across the desert, was nearly dead when she had a vision that a nearby wild cactus would save her life. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 60 (The Notably Trials Library 2005) (2001). She ate the plant and gained the strength to locate and return to her village. *Id.* Ever since, Native Americans have used the cactus to cure diseases, acquire strength, see visions, or as talisman carried on or placed close to the body for good luck or protection, or simply as a god-object to which prayers can be directed. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 878, *available at* http://www.religion-online.org/showarticle.asp?title=886. In a typical peyote church service, participants wear their finest garments to sit around a ceremonial fire all night in a tipi. *Id.*; GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 61 (The Notably Trials Library 2005) (2001). A Road man, a type of pastor, officiates the service, with the aid of a Fire man, charged with tending the fire, a Cedar man, charged with maintaining the incense (cedar aroma), and a Drummer, charged with maintaining a steady cadence throughout the night on a drum. At several points throughout the night, the celebrants are offered peyote and celebrants sing songs related to the ceremony. *Id.* The rest of the participants sit motionless, gazing into the fire and meditating on peyote's gifts. *Id.* Throughout the night, consecrated water is also consumed. *Id.* At sunrise, the participants eat breakfast together and disperse in a sober state, as peyote's effects have typically worn off. *Id.* The ceremony is described as powerful probably because peyote increases concentration allowing participates to focus on their weaknesses and on the spiritual tasks they must perform. *Id.* at 61–62. Additionally, peyote allows the participants to disregard their suffering from sitting cross-legged for between twelve to fifteen hours without back support. *Id.* at 62. Hallucinations, visions, or related "bad trips" are rare and regarded as a bad sign. *Id.* Adherents of peyote religion have a united ethical code. *Id.* Members are to consume peyote only at a meeting or church service, convened and controlled by a leader. *See id.* The use of peyote for nonreligious purpose is considered sacrilegious. *See id.; accord* Employment Div., Dep't Human Res. Oregon v. Smith (*Smith II*), 494 U.S. 872, 919 (1990) (Blackmun, J., dissenting) (citing Brief for Association on American Indian Affairs et al. as Amici Curiae 5-6)).

U.S. jurisdictions, but the federal government and twenty-three states also granted exemptions for religious use.[43] Oregon, however, maintained a flat ban with no exemption for religious purposes. Smith and Black filed claims for unemployment compensation with the Employment Division of the Oregon Human Resources Department. Their claims were denied on the ground that their dismissal was work-related "misconduct."[44] ADAPT, their former employer, instigated that denial.[45] The two men appealed their case first to the Oregon Employment Appeals Board,[46] and then to the Oregon Court of Appeals and the Oregon Supreme Court.[47] The state supreme court ruled that, while the state constitution and laws provided no exemption for religious use of peyote, denying the claimants benefits for using peyote in religious ceremonies

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> To the members, peyote is consecrated with powers to heal body, mind and spirit. It . . . teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit. *Id.*

43. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, *available at* http://www.religion-online.org/showarticle.asp?title=886 (indicating twenty-three states afford such religious exemptions). Federal drug authorities even issued licenses to produce peyote for religious users. *Id.*

44. OR. REV. STAT. § 657.176(2)(1) (West 2006). Oregon law permitted the denial of benefits to an individual who is "discharged for misconduct connected with work." *Id.* (citing Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 664 n.6 (1988)). The particular act of misconduct that, under the State's administrative regulation, can lead to denial of benefits was "a willful violation of the standards of behavior which an employer has the right to expect of an employe [sic]." *Id.* (quoting OR. ADMIN. R. 475-030-0038 (West 2003)).

45. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 141 (The Notably Trials Library 2005) (2001). For ADAPT, firing Black and Smith was not enough. Rather, in addition, the agency considered it "offensive," as Professor Epps averred, "for heretics like Black and Smith to profit from apostasy" by receiving unemployment benefits. *Id.*

46. *Id.* at 142–43. This is an administrative agency, above the Employment Division (of the Department of Human Resources), charged with responsibility for review of denials of claims for unemployment compensation. *Id.* The board reversed judgments for the claimants by the Employment Division. *Id.* (including the reasons the board gave for denying benefits).

47. *Id.* at 142–43. Oregon rules of civil procedure grant the right of direct appeal from the Employment Appeals Board to the Oregon Court of Appeals, by "aggrieved parties." *Id.* at 143. From this point on, the proceedings in the litigation would become public and additionally ADAPT would no longer be the only party opposing the claimants. *Id.* The Oregon Attorney General's Office, led by David Frohnmayer, would also come on board. *Id.*

> [B]ecause the appeal was a challenge to the decision of a state agency, the attorney general's office now entered the case, representing the Employment Appeals Board. The Attorney General's office was not primarily concerned with the effect of the case on ADAPT or its philosophy of treatment; its concerns were the state's unemployment system, its constitution, and its drug laws. *Id.*

contradicted the U.S. Supreme Court's precedents in *Sherbert* and its progeny (discussed *infra*), and violated their rights under the Free Exercise Clause of the Constitution.[48] Oregon appealed to the U.S. Supreme Court,[49] which granted review.[50] There, in the first *Smith* case, the Supreme Court, per Justice Stevens, vacated Oregon state court judgments and the Oregon Supreme Court, and remanded the case for a ruling as to "whether the religious use of peyote was legal in Oregon."[51] On remand, the Oregon Supreme Court ruled, in a *per curiam* opinion, that

> [t]he Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote, but . . . outright prohibition of good[-]faith religious use of peyote by adult members of the Native American Church would violate the First Amendment. We therefore reaffirm our holding that the First Amendment entitles petitioners to unemployment compensation.[52]

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48. *Id.* at 147. The litigation came to the Oregon Supreme Court as two separate cases. *Id.* at 143. Regarding Al Smith, the court ruled, "[t]he legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously[-]motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of the peyote." *Id.* at 172–73 (quoting Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 666 (1988)). As to Black, it ruled that denial of benefits "did not violate [the Oregon religious clauses] but did violate the free exercise clause of the First Amendment of the U.S. Constitution." *Id.* at 147 (citing Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 661–62 (1988)).

49. *Id.* Epps wrote that as Frohnmayer, Oregon State's attorney general, "saw it, the opinions in both cases [Black and Smith] seemed to beg for Supreme Court review." *Id.* This is not to mention the attorney general's conviction that "someone must be behind this challenge," specifically that the two lawsuits were "a test case being brought by civil libertarians or drug reformers." *Id.* at 148. In its petition for *certiorari*, the Attorney General's office framed the question presented in *Smith I* as, whether "the Free Exercise Clause compel[s] a state to award unemployment benefits to a drug rehabilitation counselor who agrees to refrain from using illegal drugs as a condition of his employment and is fired for misconduct after illegally ingesting peyote as part of a religious ceremony?" *Id.* at 148–49.

50. Employment Div. v. Smith, 480 U.S. 916 (1987). Upon granting *certiorari*, the Supreme Court consolidated the two lawsuits into one case denominated *Employment Division, Oregon Department of Human Resources v. Smith and Black*. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 149 (The Notably Trials Library 2005) (2001).

51. Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 660 (1988). Only four members of the Court joined the opinion, three of whom (Justices Brennan, Marshall, and Blackmun) strongly dissented. *Id.* at 675–80 (Brennan, J., dissenting). Justice Kennedy did not participate in the decision. *Id.* at 660.

52. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 187–88 (The Notably Trials Library 2005) (2001) (quoting Smith v. Employment Div., 763 Pa. 146, 148 (Or. 1988)). To the query by the United States Supreme Court as to whether peyote religious use was protected under the Oregon constitution, the Oregon Supreme Court

The dispute should have ended here if the Oregon Attorney General's Office had not asked for the U.S. Supreme Court's involvement again.[53] This time the Attorney General, in his petition for review, argued that the case now presented the issue of whether "the federal constitution protects religious use of dangerous drugs."[54] Once again, the Supreme Court obliged by granting *certiorari*.[55]

In an opinion by Justice Antonin Scalia, the Court held that the Free Exercise Clause did not preclude enforcement of otherwise valid laws of general application that incidentally burden religious conduct.[56] Stated

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responded in a terse footnote as to why it could not give an answer: "Because no criminal case is before us, we do not give an advisory opinion on the circumstances under which the prosecuting members of the Native American Church under [the state statute] for sacramental use of peyote would violate the Oregon Constitution." *Id.* at 188 (quoting Smith v. Employment Div., 763 Pa. 146, 148 n.3 (Or. 1988)). Professor Epps observes that the Oregon Supreme Court's opinion "was a skimpy, oddly truculent document." *Id.* at 187. Part of the reason for that conclusion was that the opinion was a *per curiam* decision no single justice took credit for writing. *Id.* "This form of opinion is usually reserved for decisions that raise few interesting issues or have been made necessary by the obstinacy of the parties rather than the legal requirements of the case." *Id.* However none of these requirements for a *per curiam* decision presents itself here. Overall, "[t]he opinion had an impatient tone, as if the court was asking what *Smith* was doing in front of it again." *Id.* at 188. The opinion could be read as reminding the United States Supreme Court that they invented the First Amendment case law. *Id.* "[I]t is *your* doctrine, the opinion can be read to say; if you want to scrap it, then *you* do it." *Id.*

53. *Id.* at 189. Frohnmayer could not just drop the issue. *Id.* at 188. He believed the Oregon Supreme Court was wrong on the merits in that, "by favoring peyote religion, it 'established' this one sect as a favored government church[,]" and its decision would open the floodgates for litigation over religious drug use. *Id.* at 189. Concerned that "[t]he wrong result in Washington might harm Indian religion around the country[,]" Oregon newspapers, including one from the AG's hometown, ran editorials criticizing his decision to seek review of *Smith I*. *Id.* at 189. There were other groups or organizations that advised Frohnmayer, but to no avail, not to seek review. *Id.* These included a group of professors from the Oregon University School of Law. *Id.* Another organization was the Native American Rights Fund (NARF), "a powerhouse in the world of federal Indian law," which "represents tribal governments and Native organizations around the country." *Id.* at 185, 194. NARF wrote circular letters requesting its members to call or write Frohnmayer, advising him to act compassionately by dropping the case. *Id.* at 194.

54. *Id.* at 188. The Attorney General, in his petition for review, went as far as to suggest that "the federal exemption for religious peyote use was constitutionally suspect." *Id.* "[T]he [federal] exemption for peyote was merely a product of the [Drug Enforcement Administration's] perception of congressional will; that in fact the agency lacks authority to create such exemptions; and that, in any event, congressional members were wrong." *See id.* at 189.

55. *Id.* (citing Employment Div. v. Smith, 489 U.S. 1077, 1077 (1989)). The Supreme Court granted *certiorari* on March 19, 1989, little over three months after Oregon's Attorney General made the request for review on January 16, 1989. *Id.*

56. Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve [an] individual of the obligation to comply with valid or

differently, the Constitution did not bar Oregon from enforcing its blanket ban on peyote possession, which, in turn, permitted denial of unemployment claims of persons who used peyote in religious ceremonies.[57] Beginning with *Sherbert v. Verner*,[58] when reviewing free exercise challenges, the Court has applied a balancing test known as "strict scrutiny."[59] Under this test, a government policy, law, or regulation,

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neutral law of general applicability on the ground that the law proscribes (or requires) conduct that is contrary to his religious practices.").

57. *Id.* at 874, 890.

58. 374 U.S. 398 (1963) (holding that South Carolina's conditioning of the availability of benefits upon a Seventh-Day Adventist's willingness to violate a cardinal principal of her religious faith not to work on the Sabbath effectively penalized her right under the Free Exercise Clause). *Sherbert* is a signature decision of the Supreme Court under the chief justiceship of Earl Warren (1891-1974) from 1953 to 1969, which era many assess as liberal or progressive. The case is considered "the cornerstone of federal free-exercise law." GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 113 (The Notably Trials Library 2005) (2001). And one of the reasons minority groups regarded the Warren Court "as the special guardian of their place at the American table." *Id.* at 115. The decision's author was none other than Justice Brennan, a judge noted for his "ready sympathy for the ordinary American facing the coercive power of the state," and one who is praised as "the intellectual spark plug of Warren-era liberalism." *Id.* at 115, 121–22. The same Brennan inspired the revival of state constitutional law that took place in Oregon and many other states during the 1970's. With the federal judiciary turning conservative during this period, Brennan advised activist lawyers that the golden age of federal civil-liberties litigation was now over, and that, in bringing claims, they should first look to their state constitutions. His point was that the increasingly conservative federal courts had no jurisdiction to contradict state court rulings interpreting state constitutions given that such cases, in legal parlance, would not present a "federal question" that would justify the intervention of federal courts. *See id.* at 121–23. In *Sherbert*, the Court did not hold that a burden on free exercise was something flatly forbidden by the Constitution. "Instead, it measured the denial of benefits by a test it imported from its cases on freedom of speech: the state could [burden a religious practice if and only if it] was pursuing some compelling state interest and it could further show that no alternative forms of regulations would achieve the same end." *Id.* at 116. Here, the only recognized governmental interest the Court found was South Carolina's desire to prevent false claims or save money by denying a religious claim for unemployment compensation. But, in the assessment of the Court, this did not rise to some compelling interest, given that the grant of an exception for Mrs. Sherbert, the Seventh-Day Adventist whose religious practice South Carolina burdened, would not destroy the state's ability to protect the fund from fraud. *Id.* Note that the rule of accommodation for minority religion the case established occurred over strong dissent of two judges, Justices John Marshall Harlan and Byron White. Both believed the ruling went too far. They argued that by treating nonreligious and religious claimants equally, the state had fulfilled its constitutional duty. *Id.*; *see Sherbert*, 374 U.S. at 420 (Harlan, J., dissenting).

59. Strict scrutiny is the highest among three standards of constitutional review United States courts apply in challenges of laws or regulations relating to fundamental rights and suspect classifications. Examples of fundamental rights calling for application of strict scrutiny are marriage and procreation, interstate travel, the right to vote, access to justice, and, relevant here, the right to free exercise of religion. THOMAS R. HENSLEY,

imposing a substantial burden on religious practices is upheld only if it served a compelling governmental interest and is narrowly-tailored to achieve that end.[60] Instead, under the new rule the Court's majority held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."[61]

CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 610, 612 (1997). Examples of suspect classifications include race, challenges relating to affirmative action programs, and sometimes, alienage. *Id.* at 610; *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (holding that States could not deny welfare benefits to aliens). Not all alienage classifications invite strict scrutiny. Instead, some, such as classifications or challenges involving matters of public employment get rational basis evaluation, while others, such as those involving public education are assessed under intermediate scrutiny. *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 720–25 (13th ed., 1997). The two other tests, not relevant here, all of them lower than strict scrutiny, are the rational basis and intermediate scrutiny approaches. Rationality review affords only minimal scrutiny of a classification or policy under challenge; such classification or policy passes constitutional muster if there is a legitimate government interest at stake and the means used to achieve that interest are rationally related to the interest. Because this test defers to the judgments of policymakers, a classification or policy reviewed under the test is normally upheld. The burden of proof is also upon an individual challenging an affected government policy to show that there can be no conceivable basis for the policy or classification, something often not easy to do. *See id.* at 635–62. Under the intermediate scrutiny test, a classification or policy under challenge is upheld as constitutional if there is an important governmental objective involved and the classification or policy is substantially related to the achievement of the objective. Like strict scrutiny and unlike rational basis, the burden is upon the government to prove that the classification in question serves important governmental objectives and is substantially related to the achievement of those objectives. *See, e.g., id.* at 681–720.

60. Sherbert v. Verner, 374 U.S. 398 (1963). Due to the place *Sherbert* holds in the Supreme Court's free exercise jurisprudence, strict scrutiny is sometimes referred to as the *Sherbert* test. In the aftermath of the case, and until *Smith II*, "[c]onstitutional lawyers came to consider the 'compelling interest test,' . . . as the basic template for deciding questions under the Free Exercise Clause." GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 116 (The Notably Trials Library 2005) (2001). Cases generally recognized as progeny to *Sherbert* include: *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (invalidating Wisconsin's mandatory school attendance law as applied to Amish parents who refused to send their children to school on religious grounds); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (striking down Indiana's denial of unemployment compensation to a Jehovah's Witness who quit his job because of his religious objections to war); and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 (1987) (upholding the unemployment compensation claim of an employee whose religious beliefs had changed during the course of her employment). As the Court itself concedes in *Smith II*, these cases stand for "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 884 (1990).

61. City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (analyzing *Smith II*). As Professor Epps extrapolated, the new rule meant that "if a law didn't target religion, then minori-

Justice Scalia stated that the correct meaning of "free exercise" was that it protects religious worshipers only against laws specifically aimed at religious practice.[62] When a case concerned an "across-the-board criminal prohibition on a particular form of conduct," he said, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable."[63] He claimed the only instances in which the Court had found a neutral, generally applicable law unconstitutional were "hybrid" cases, involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children."[64] Scalia said courts applying the *Sherbert* test to neutral, generally applicable laws "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind,"[65] and destroy the power of the government to make rules for society. Although Americans value and protect religious diversity and divergence, "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[66] He said religious minorities penalized or outlawed by "neutral laws" should take their case to Congress and the state legislatures which could, if they choose, protect their religious practice, rather than look to the courts for accommodation.[67] Scalia conceded that "leaving [religious] accommodation to the political process will place [minority religions] at a relative disadvantage," but saw that as an "unavoidable consequence of democratic government [that] must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[68] Responding to Justice O'Connor's contention that there should be "nothing talismanic about neutral laws of general applicability,"[69] Justice Scalia replied, "[o]ur conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be

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ties whose practice was destroyed were out of luck." GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 224 (The Notably Trials Library 2005) (2001).

62. Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 885 (1990).

63. *Id.* at 884–85.

64. *Id.* at 881–82.

65. *Id.* at 888.

66. *Id.*

67. *Smith II*, 494 U.S. at 890.

68. *Id.*

69. *Id.* at 901 (O'Connor, J., concurring). Justice O'Connor's point was that all laws burdening religious practices be subjected to strict scrutiny, given that "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech a 'constitutional norm,' not 'an anomaly.'" *Id.*

justified by a compelling governmental interest is the only approach compatible with these precedents."[70]

Justice O'Connor concurred in the opinion[71], while three other Court members, Justices Blackmun, Brennan, and Marshall outrightly dissented.[72] O'Connor asserted that strict scrutiny should have been applied in the case, and she disagreed with the contention that accommodation of minority religions is now something left to legislatures and the political process.[73] Concerning the first point, O'Connor stated that the First Amendment

> does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[74]

She assessed the rule on neutral, generally applicable laws Justice Scalia laid down in *Smith II* to be a "sweeping result," that is accomplishable only by "a strained reading of the First Amendment," and a disregard of the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."[75] She pointed out that in *Yoder*, the Court "expressly rejected the interpretation [it] now adopts" in *Smith*,[76] and lambasted the factors Justice Scalia recounted in the case for not applying the *Sherbert* test as a "parade of horribles."[77] In short, Justice O'Connor considered *Sherbert* a

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70. *Id.* at 886 n.3.

71. *Smith II*, 494 U.S. at 894 (O'Connor, J., concurring).

72. *Id.* at 907 (Blackmun, J., dissenting).

73. *Id.* at 904.

74. *Id.* at 894.

75. *Id.* at 892.

76. *Id.* at 895–96 (citing Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972)) (stating that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirements for government neutrality if it unduly burdens the free exercise of religion").

77. *Smith II*, 494 U.S. at 902. Justice O'Connor stated that this parade of horribles "not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Id.*

valid and workable test in both unemployment and non-unemployment cases.

[T]he sounder approach–the approach more consistent with our role as judges to decide each case on its individual merits–is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal intent asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.[78]

Concerning Justice Scalia's claim that accommodation of minority religions be left to the political process, Justice O'Connor stated that the First Amendment was enacted "precisely to protect the rights of those whose religious practices are not shared by the majority . . . [,]"[79] and that "the history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."[80] To Justice O'Connor, the best way to preserve the Bill of Rights was to use the *Sherbert* test and decide free-exercise challenges on a case-by-case basis.[81] For all the flaws O'Connor noted in the Court's reasoning, she still concurred with the majority because she believed the case did not warrant strict scrutiny; instead, in her assessment, Oregon has a compelling interest in proscribing the use of certain drugs according to its own drug laws.[82]

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78. *Id.* at 899.

79. *Id.* at 903.

80. *See id.* at 903 (invoking for support the statement of Justice Jackson in W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), to the effect that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections").

81. *See id.* at 903. "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury' . . . is to denigrate '[t]he very purpose of a Bill of Rights.'" *Id.* at 888.

82. *Smith II*, 494 U.S. at 905.

> Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. *Id.*

Writing for the dissent, Justice Blackmun indicated that strict scrutiny applied in this case.[83] Because Oregon "could not constitutionally enforce its criminal prohibition against respondents," its interests in this matter does not rise beyond the "fear of false claims," and "it cannot justify its denial of unemployment benefits."[84] Concerning Justice Scalia's indication that judicial solicitude for minority religions is now at an end, Justice Blackmun stated he did not "believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty–and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religious Clauses precisely in order to avoid that intolerance."[85]

B. *Post-Mortem Analysis*

In a work published on the eve of the *Smith* case, Professor Laycock warned "[i]f the Supreme Court focuses too narrowly on drugs in this case and misses the larger issue of religious ritual, it could create a devastating precedent for religious liberty."[86] The Supreme Court failed to

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In the apt assessment of Professor Epps, "O'Connor's concurrence reads more gently than Scalia's harsh manifesto, but it provided no more comfort to the [Native American] Church, and indeed probably less. Scalia at least was saying to religious groups that they were all in the same boat, at the mercy of the lawmakers. O'Connor's soothing tone seemed to reassure ordinary Americans that *their* liberties were safe; it was only 'drug users' who were in danger from the law." GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 223 (The Notably Trials Library 2005) (2001).

83. *See id.* at 909 (Blackmun, J., dissenting). Among other things, the dissent bitterly accused the majority of "mischaracterizing this Court's precedents," "discarding leading free exercise cases . . . as 'hybrid,'" "effectuat[ing] a wholesale overturning of settled law concerning the Religion Clauses of our Constitution," and assuming a "distorted view of our precedents." *Id.* at 908.

84. *Id.* at 921. The dissent contended that Oregon's regulatory interest justifying the denial of benefits is not distinguishable from the interest the Court rejected in earlier precedents in *Frazee, Hobbie, Thomas and Sherbert.* All of these cases, except *Frazee*, were discussed in *supra* note 60. In Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989), the Supreme Court relied on *Sherbert* and its progeny to unanimously reverse the disqualification of benefits for a claimant whose refusal to accept employment requiring that he work on Sunday was not based on his membership in "an established religious sect or church," but instead only on his claim "that, as a Christian, he could not work on 'the Lord's day.'" *Id.* at 830.

85. *Id.* at 909.

86. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, *available at* http://www.religion-online.org/showarticle.asp?title=886. Laycock believed "the Native American use of peyote has substantial parallels to Christian and Jewish uses of wine." *Id.* at 876. He criticized the decision of the Supreme Court to grant review in the case as an "exercise of judicial activism." *Id.* at 877. Judicial activist judges or courts use their power of interpretation and judicial review to checkmate "the activities of Congress, state legislatures, and administrative agencies when those govern-

heed Laycock's prescient warning. The decision also revealed Scalia's judicial philosophy as "a lawyer skeptical of the transformative power of law, [and] a jurist uneasy with judicial authority."[87] Epps points to another aspect of *Smith II*: the accession to power of conservatives on the Court did not have to spell a negative outcome for religious freedom.[88] In sum, three features of *Smith II* that have formed the basis of criticisms of the decision are (a) its misreading of Supreme Court precedents relating to the Free Exercise Clause, particularly its claim that strict scrutiny is inapplicable in "neutral, generally applicable laws" that have an "incidental" impact on religious conduct; (b) its indication that solicitude for minority religion is something now left to the political process, or "a matter of politics, [rather than] law";[89] and (c) the fact that the rule relating to so-called neutral, generally applicable laws the decision laid down was

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mental bodies exceed their authority." STEFFEN W. SCHMIDT ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY 471 (2005). Judicial activist judges or courts tend to be liberal, but here, going against the grain of conventional wisdom, the Court assuming this role is conservative. *See id.*

87. Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 739 (1987). Nagareda also uncannily stated

> [t]hough frequently set forth in 'conservative' terms, Justice Scalia's jurisprudence in administrative and first amendment law calls for substantial change in existing legal doctrines. The impetus for this change stems from his tendency to view the substantive issues in a given case through the prism of the institutional constraints on courts within the scheme of representative government. For Justice Scalia, the Constitution does not give a mandate to the judiciary to ensure perfect government. That responsibility rests with the formal mechanisms of the representative process.

Id. at 738–39; *see also* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 216 (The Notably Trials Library 2005) (2001) (pointing out, "[l]ike most of Scalia's major opinions, [*Smith II*] was radical in its approach and less than respectful of Supreme Court precedent"). As Professor Epps well sums up the matter, in *Smith II*, Justice Scalia "helped the Court mold . . . a case that would let him get rid of *Sherbert*, a case he didn't like. The Court's crown prince had struck another blow. Religious freedom, after *Smith*, was a whole new game. And Nino Scalia set the rules." *Id.* at 224. Epps indicates that going back to the first *Smith* case, Justice Scalia took a keen interest in this litigation. *See id.* at 179.

88. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 166 (The Notably Trials Library 2005) (2001). As Epps explains, "[i]n general, conservatives tend to be friendly toward religious belief and to admire small religious groups that cling to their faith against the secular tide of contemporary society." *Id.* After all, Chief Justice Burger, a conservative wrote the decision in *Wisconsin v. Yoder*, which "voided the convictions of an Old Order Amish couple who refused to send their children to public school beyond the eighth grade." *Id.*

89. *Id.* at 220. As Epps poignantly indicated, Americans, both those who go to church frequently and those who do not, "are used to hearing public officials speak respectfully about [their] piety and wisdom . . . . They are not used to being told that their freedom depends on the legislature's whim or to hearing that the courts have no interest in hearing from individuals oppressed by the political process." *Id.* at 221.

never briefed and argued, as mandated under the United States adversarial system, before its announcement by the Court. The first two grounds were the bases for the disagreement by Justice O'Connor and the three justices in dissent who opposed the Court. The same is also true of the numerous critics who have written commentaries on the case.[90] The remaining point to which we turn next is that, unlike in some free exercise claims where an argument preceded adoption of a change in standard,[91] in *Smith II*, the Court perpetrated a "doctrinal shift," embodied in the discard of strict scrutiny, that was "neither briefed nor argued."[92] Instead, "*Smith II* took the parties by surprise in the sense that neither the state Attorney General nor any of the parties anticipated that the Court would use this case as a vehicle for recasting the standard governing the evaluation of a claimed violation of free exercise."[93]

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90. *See, e.g.*, Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990) (contending that *Smith* was "inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent"); *Indian Religion: Must Say No*, ECONOMIST, Oct. 6, 1990, at 25 ("During Prohibition, the large Catholic minority won congressional support for communion wine. Now apparently, a smaller minority simply takes its lumps."); Samuel Rabinove, *The Supreme Court and Religious Freedom*, CHRISTIAN SCIENCE MONITOR, June 25, 1990, at 19 ("[H]istory tells us that unpopular religious minorities, such as Mormons or Jehovah's Witnesses, have had problems with legislatures that were insensitive, if not hostile, to their concerns. Under the Supreme Court's ruling the free exercise clause no longer protects against such eventualities."); Nat Hentoff, *Justice Scalia vs. The Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25 ("Almost in time for the celebrations of the bicentennial of the Bill of Rights, Justice Scalia has interpreted this quintessential part of the First Amendment to be a majoritarian rule rather than a protection of individual conscience."); Edwin Yoder, *A Confusing Court Ban on Peyote's Ritual Use*, ST. LOUIS POST-DISPATCH, Apr. 24, 1990, at 3C ("In theory, all religions are equal under the First Amendment; but in the eyes of the [C]ourt, some are clearly more equal than others. Alcohol, the sacramental element of choice for Christians and Jews, is allowable; peyote, the element of choice for Indians, is not."). For a listing of commentaries defending the decision, though not always its reasoning, see STEVEN G. GEY, RELIGION AND THE STATE 861 (2001) ("notes on the fallout from *Smith*"). Some of the harshest criticisms, such as the one by Hentoff, were directed personally at Justice Scalia. Nat Hentoff, *Justice Scalia vs. The Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25.

91. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 480 (2001) (citing Bowen v. Roy, 476 U.S. 693 (1986)). There the Court rejected a free exercise challenge to a requirement in federal welfare programs that applicants for benefits be identified by social security numbers. Bowen v. Roy, 476 U.S. 693 (1986).

92. *See* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 480 (2001).

93. *Id.; accord*, GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 216 (The Notably Trials Library 2005) (2001) (commenting on the reactions of the

III. FOUR AFTERMATHS OF *SMITH*

In the aftermath of *Smith*, State and Federal governments enacted four significant measures: (1) the Religious Freedom Restoration Act (RFRA) (coupled with the decision in *City of Boerne v. Flores*); (2) the American Indian Religious Freedom Act (AIRFA) of 1994; (3) amendments to Oregon's Controlled Substance Act; and (4) the Religious Land Use and Institutionalized Persons Act (RLUIPA).[94] Each episode predated publication of Epps's book; however, the work did not cover the RLUIPA. Since the *Smith* story is incomplete without considering the RLUIPA, the law is incorporated here as an update to Epps's narratives.

A. *The Religious Freedom Restoration Act (RFRA) and* City of Boerne v. Flores

The first aftermath of *Smith* is the Religious Freedom Restoration Act (RFRA) of 1993.[95] The statute was praised as "the most important congressional action with respect to religion since the First Congress pro-

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Attorney General's Office following publication of the *Smith* case, "what they were realizing is that the Court had done something no one had asked or expected it to do. All of the state's arguments, all of Smith and Black's counter arguments, were couched in terms of the 'compelling interest' test of *Sherbert v. Verner.*"); *id.* at 219 (stating, for the lawyers, as well as the plaintiffs, "[t]he entire case had taken place within the context of the *Sherbert* test."); *id.* at 150 (commenting on how Dean Jesse Choper of Berkeley's Boalt Hall School of Law, Frohnmayer's old constitutional-law professor and a leading authority on church-state issues, flatly told assembled lawyers in a strategy session that followed receipt of *certiorari* for *Smith II*, "to forget any thought of challenging *Sherbert.* The Court was wedded to it . . ."); *id.* (stating that based upon Choper's advice, "Frohnmayer and his subordinates worked on the assumption that *Sherbert* would be the framework under which the case would be decided."). An attempt after the fact by the coalition of interest groups that fought to overturn *Smith* in Congress to correct the lack of argument and briefing on "neutral, generally applicable laws" through rehearing, turned out to be medicine after death. The Court easily rejected the request for a rehearing in a one-sentence order it released on June 4, 1990. *See id.* at 229. However, the issue of whether the rule on "neutral, generally applicable laws" touching on the Free Exercise Clause laid down in *Smith II* should have been briefed and argued beforehand refused to go away, as the dissents of Justices O'Connor and Souter in the *Flores* case convey.

94. There is no suggestion that the four occurrences treated here exhaust the universe of events that attended the legal and constitutional tsunami that the *Smith* case signified, for they do not. *See, e.g.,* STEVEN G. GEY, RELIGION AND THE STATE 923–32 (2d ed. 2001) (documenting a number of important occurrences preceding the passage of the RLUIPA, some of which occurrences informed the crafting of the act and discussing the proposal for a Religious Liberty Protection Act, in 1998 by the 105th Congress, along with arguments against such a law); *see also id.* at 908–923 (reproducing text of a testimony by Professor Douglas Laycock given on October 1, 1997 to the Senate Judiciary Committee, discussing possible congressional responses to *Flores*).

95. 42 U.S.C. §§ 2000bb (2005).

posed the First Amendment,"[96] and evolved as Congress's "direct response" to *Smith II*.[97] Although many in Congress independently assessed the case to be wrongly decided, in passing the law, Congress acted mostly out of pressure from cross-sections of the American public who were outraged by the *Smith* case. In addition to analysts who wrote in scholarly and popular media savaging the decision,[98] these entities include religious organizations of every description and civil rights groups. Appearing to take to mind the advice of Justice Scalia in *Smith II* that religious accommodation was now something left to the political process rather than to unelected federal judges, these groups pressed Congress to *restore* religious freedom, by reinstating the strict scrutiny standard or the *Sherbert* test.[99] Congress obliged them with the passage of the RFRA. Based on Congress's power to enforce civil rights under the Fourteenth Amendment,[100] the bill sailed quickly through Congress,[101] and President Clinton wasted no time in signing it into law on November 16, 1993. *Smith* prompted governmental action that infringed upon religious exercises.[102] The best-known case, *You Vang Yang v. Sturner*, involved autopsies conducted by the government.[103] *Sturner* involved the Hmong, a Southeast Asian immigrant group in Rhode Island, for whom autopsies

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96. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 243 (1994).

97. City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

98. *See, e.g.*, STEVEN G. GEY, RELIGION AND THE STATE 861 (2001); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); *Indian Religion: Must Say No*, ECONOMIST, Oct. 6, 1990, at 25; Samuel Rabinove, *The Supreme Court and Religious Freedom*, CHRISTIAN SCIENCE MONITOR, June 25, 1990, at 19; Nat Hentoff, *Justice Scalia vs. The Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25; Edwin Yoder, *A Confusing Court Ban on Peyote's Ritual Use*, ST. LOUIS POST-DISPATCH, Apr. 24, 1990, at 3C.

99. KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 484 (8th ed. 2005). Professor Janda and his colleagues, in their popular textbook on American government, praised the political response to Smith as "an example of pluralism in action[.]" *Id.*

100. U.S. CONST. amend. XIV. The Fourteenth Amendment forbids States from denying anyone within their borders "the equal protection of the laws." *Id.* But the specific section from which Congress drew its authority in enacting the law is section 5, which stipulates that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5.

101. KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 484 (8th ed. 2005). The legislation passed unanimously in the House of Representatives and by a 97–3 margin in the Senate. *Id.*

102. *See id.* ("At first the coalition failed to rouse much public interest in a case involving the use of hallucinogenic drugs. But as government infringements on religious practice mounted, public interest and legislative reaction soon meshed.").

103. 728 F. Supp. 845 (D.R.I. 1990).

meant that the spirit of the deceased remained on earth to torment its family rather than find its way to heaven.[104]

The RFRA was enacted with the aim of voiding *Smith*'s holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[105] Consistent with this goal, the statute's stated purposes was "to restore the compelling interest test as set forth in *Sherbert* . . . and . . . *Yoder*, . . . [,] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[106] The act also goes beyond these purposes "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[107] The RFRA forbade "the government from substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[108] Finally, to ensure effectiveness in resolution of the evil the law was designed to cure, the scope of the law was broad, covering any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . . subdivision of a State."[109]

In sum, the RFRA conveyed to the Court that *Smith* was incorrectly decided. The statute's very title, "Religious Freedom *Restoration* Act," suggests that the Court erred by taking away something of value belonging to somebody else that needed reinstitution.[110] One reporter who

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104. *See* You Vang Yang v. Sturner, 728 F. Supp. 845 (D.R.I. 1990); *see also* S. 2969, 102d Cong. §§ 2–3 (1992).

105. Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 879 (1990).

106. 42 U.S.C. § 2000bb(b) (2005).

107. *Id.*

108. 42 U.S.C. § 2000bb-1(a)&(b) (2005).

109. 42 U.S.C. § 2000bb-2(1) (2005); *see also* U.S.C. § 2000bb-3(a) (2005) (specifying that the RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [the RFRA's enactment])."

110. S. 2969, 102d Cong. §§ 2-3 (1992) (emphasis added). In addition to the stated purposes of the act, there were also other statements, suggesting error by the Supreme Court and Justice Scalia as author of *Smith*. For example, the expressed findings of Congress, underlying enactment of the law, stated, among other things, that in *Smith*, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for *striking sensible balances* between religious liberty and competing prior governmental interests." 42 U.S.C.A. § 2000bb(a) (2005) (emphasis added). Notice that the last finding parallels Jus-

called to inform Frohnmayer that the Supreme Court has announced its decision in *Smith*, indicated that the Court "t[ook] away" religious freedom.[111] Through the RFRA, Congress worked to bring back the freedom the Court took away. This would have been a story with a good ending if the matter had ended there. But instead, whatever victory for religious freedom the RFRA symbolized, it turned out to be short-lived.

One inauspicious occurrence that pointed to that non-permanence—as well as the ability of the Supreme Court to laugh last and best—was *City of Boerne v. Flores,*[112] released four short years after enactment of the RFRA. In *Flores*, the Supreme Court, per Justice Kennedy, invalidated the RFRA on the ground that Congress exceeded its enforcement powers under the Fourteenth Amendment in passing the law, particularly as applied against the States.[113] The Court reasoned that Congress lacked any "substantive, non-remedial power under the Fourteenth Amendment,"[114] invoking the history and design of the amendment as well as case law;[115] that congressional power to enforce under the Fourteenth Amendment does not encompass "the power to determine what constitutes a constitutional violation;"[116] and that the exclusive power to interpret and define the rights secured by the Fourteenth Amendment was something that belonged to the judiciary, rather than Congress.[117] Three justices, Justices

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tice O'Connor's concurring opinion in *Smith II* to the effect that "[t]he Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to *strike sensible balances* between religious liberty and competing state interests." Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) (emphasis added). Subsequent events contributed to reinforce, rather than ameliorate, that sense of error attributed to Scalia and the Court. For example, in a declaration accompanying his signature of the bill into law, President Clinton stated, "this act reverses the Supreme Court's decision in Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the founders of the nation than the Supreme Court decision." DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF *Oregon v. Smith* 240 n.25 (2000). He also enjoined, "Let us respect one another's faiths, fight to the death to preserve the right of every American to practice whatever convictions he or she has . . .". *Id. See also* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 233–34 (The Notably Trials Library 2005) (2001).

111. *Id.* at 215.

112. 521 U.S. 507 (1997) (overturning an appeals court's ruling rejecting a city's denial of a Catholic Church's request, anchored on the RFRA, to expand its growing parish into the city's historic district).

113. City of Boerne v. Flores, 521 U.S. 507 (1997).

114. *Id.* at 527.

115. *See id.* at 520–26.

116. *Id.* at 519.

117. *Id.* at 536.

O'Connor, Breyer, and Souter, disagreed with this judgment.[118] In addition to her comments to the effect that *Smith* was wrongly decided,[119] Justice O'Connor also pointed out that the provisions of the RFRA did not directly or indirectly abridge the religious rights of any group or individual; instead, they sought to accommodate the individual rights of adherents of minority religions whose religious practices conflict with generally applicable law.[120]

Flores signified the Supreme Court's "brisk[ ] reject[ion] [of] Congress's attempt to tell it how to rule on religious-freedom issues."[121] The idea animating sponsorship of the RFRA was that the power to enforce under the Fourteenth Amendment "would allow Congress to enact a rule of decision for free-exercise cases that would, by going beyond the minimum protection set by *Smith*, guarantee the integrity of the First Amendment right."[122] But, as indicated, the Supreme Court saw the matter differently.[123] The difference between *Flores* and *Smith* was that the

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118. *Flores*, 521 U.S. at 544 (O'Connor, J., dissenting). O'Connor's dissent was limited to the disposition of the case. *Id.* She agreed with the majority that the RFRA was unconstitutional, but was dismayed that the Court used *Smith* "as a yardstick for measuring the constitutionality of the RFRA." *Id.* at 545. O'Connor said she "remain[ed] of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there." *Id.* at 544–45. Left to her, she "would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for re-argument." *Id.* at 545. Justice O'Connor believed "[i]f the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause." *Id.* Justice Souter, in his own dissent, raised "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence." *Flores*, 521 U.S. at 565 (Souter, J., dissenting). Like Justice O'Connor, he believes the merits of the *Smith* rule need briefing and argument, adding: "I am not now prepared to join Justice O'Connor in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for re-argument permitting plenary reexamination of the issue." *Id.*

119. *Id.* at 544–45 (O'Connor, J., dissenting).

120. *Id.* at 544–65.

121. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 235 (The Notably Trials Library 2005) (2001).

122. *Id.* at 232.

123. For an eloquent and thoughtful critique of the *Flores* decision, see K. G. Jan Pillai, *In Defense of Congressional Power and Minority Rights Under the Fourteenth Amendment*, 68 MISS. L.J. 431 (1998). Professor Pillai lamented the Rehnquist Court's reinterpretation of the scope of Congress's enforcement power as a "perilous course . . . not redeemable by the text, design, or history of the Amendment or by the Court's own carefully evolved precedents." *Id.* at 516–17, 435. Professor Pillai is of the view that given its status "as the coordinate, if not the preeminent, and certainly the most democratically accountable, branch of our government," Congress is entitled to a "measure of judicial

opinion was not written by Justice Scalia, much criticized for authoring *Smith*,[124] but rather by Justice Kennedy, a judge with a reputation for level-headed views on the Court.[125] This meant that the *Smith* doctrine is back as the law of the land.[126] *Flores* represented an intriguing occurrence, considering that in *Church of the Lukumi Babalu Aye v. Hialeah*,[127] decided in 1993, the Court appeared to be inching its way back

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deference" that "should be at least equal to the deference the Court customarily accords to legislative interpretations of agencies charged with the administration of federal statutes." *Id.* at 435 (implying this is something not present in this instant situation). For Professor Pillai's comments, as they relate to minority rights on the matter of insensitivity to minority religions, see *infra* Part IV.C.2.

124. *See* Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 739 (1987); STEVEN G. GEY, RELIGION AND THE STATE iii (2001); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); *Indian Religion: Must Say No*, ECONOMIST, Oct. 6, 1990, at 25; Samuel Rabinove, *The Supreme Court and Religious Freedom*, CHRISTIAN SCIENCE MONITOR, June 25, 1990, at 19; Nat Hentoff, *Justice Scalia vs. The Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25; Edwin Yoder, *A Confusing Court Ban on Peyote's Ritual Use*, ST. LOUIS POST-DISPATCH, Apr. 24, 1990, at 3C.

125. Kennedy, with Justice O'Connor, wielded "swing" votes that decided the outcomes on many critical issues during the era of the Rehnquist Court, from 1986 to 2005. Justice O'Connor's retirement from the Court leaves out Kennedy, comparably more conservative than O'Connor, now as the lone swing or middle justice on the new Roberts Court. *See, e.g.*, David G. Savage, Déjà Vu *Once Again*, 92 A.B.A. J. 12 (2006) (noting, "[t]his year, with O'Connor's retirement, Kennedy stood alone in deciding the outcomes in the most divisive cases"). None of the other justices on the Court fills this swing bill, certainly not former judge Samuel A. Alito Jr. of the United States Court of Appeals for the Third Circuit who replaced O'Connor.

126. The problem with this reasoning is that it suggests a choice for the Supreme Court limited only to strict scrutiny, in the Free Exercise area, signified by *Sherbert* and its progeny; and no strict scrutiny, especially in "neutral, generally applicable laws," as *Smith* signified. But matters can be more complicated, as a case like *Lukumi* teaches. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Also, even with the Supreme Court's finding of RFRA as unconstitutional, traces of the act abound within the United States. Many states have adopted RFRAs. *See* STEVEN G. GEY, RELIGION AND THE STATE 897 (2d ed. 2001) (failing to specify which States have adopted the RFRAs). One commentator has argued that these state RFRAs and the RFRA, to the extent it remains constitutional with respect to the federal government, should be viewed as imposing a "common-law exemption model." Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999). Under that model, "courts decide in the first instance whether an exemption is to be granted. But because RFRAs may be revised by the legislature, the courts' decisions aren't final. Ultimately, the tough calls will be governed by the political process, just as they have been in the common-law system under which American law has generally evolved." *Id.* at 1469.

127. 508 U.S. 520 (1993) (unanimously invalidating supposedly "neutral, generally applicable" ordinances of the City of Hialeah in Florida prohibiting the ritual slaughter of animals, upon the finding that the ordinances targeted religious practices of the Santeria sect, in violation of the Free Exercise Clause).

toward strict scrutiny, "without admitting that it is doing any such thing."[128]

In retrospect, Congress's option to ground the enactment of the RFRA on the enforcement provision of the Fourteenth Amendment rather than on the customary commerce clause,[129] was, as Professor Epps points out, "a risky strategy," given past attempts by the Supreme Court to limit congressional enforcement power, particularly with respect to racial equality.[130] This dubious history of restriction was a reason why the Civil Rights Act of 1964 was grounded on the power of Congress to regulate "interstate commerce." Congress argued in the legislative history of the act that discrimination was bad for business in America, because it made traveling, eating in restaurants, buying gasoline, and so forth, more difficult and dangerous for black Americans.[131] The Supreme Court had little

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128. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 236 (The Notably Trials Library 2005) (2001). Professor Epps assessed that "*Lukumi* was an easy case, even after *Smith*" which the Court did not treat as easy. *Id.*

> Instead, it went through a laborious parsing of the law, as if laying out for lawyers and judges the way to strike down laws affecting religion, even after *Smith* . . . . Having finally concluded that *Smith* did not apply, the Court then applied the *Sherbert test*, which, it said, *Smith* had not 'watered down' . . . Kennedy's opinion suggest that *Smith* might not apply in many cases: where laws specifically mention religious practice alone. In those cases, *Sherbert* is still the rule. *Lukumi* seem[s] to suggest that the Court had learned something from the reaction to *Smith* . . . . Now, after *Lukumi,* balancing was back, and the test was so strict that good lawyers would be able to find dozens of ways of arguing that their clients' cases were not covered by the *Smith* rule. Some observers suggested that there might not ever be another *Smith*-style case; the opinion in *Lukumi* offered ways for courts to get out of applying the harsh *Smith* rule to any real factual situation that might arise. *Id.* at 237–38.

Although released only in 1993, *Lukumi* was working its way up through the federal courts when *Smith II* was decided. Justice Scalia cited the case, albeit incorrectly, in making his case for neutral, generally applicable laws requiring no exemption on religious grounds. *Id.* at 236. He called the Hialeah ordinance under challenge "animal-cruelty laws," when, in fact, the law was aimed against ritual sacrifice. *See id.* (quoting Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 889 (1990)) (pointing out that "[t]he Hialeah ordinance, in fact, was the closest thing imaginable to Scalia's hypothetical law against bowing down to golden calves"). A case like *Lukumi* arguably serves to reinforce the point before regarding the non-wisdom of a premature discard of the RFRA as dead law. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

129. *See* U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

130. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 232 (The Notably Trials Library 2005) (2001).

131. *See generally* ROBERT D. LOEVY, THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 178–79 (1997). It is instructive to point out that one reason Congress chose the Commerce Clause over the Fourteenth Amendment was that it permitted the leaders of the Senate to refer the bill to the Commerce Committee, then chaired by Senator Warren Magnuson, a pro-civil rights liberal from

problem in accepting this argument—and upholding the act.[132] True, "bad for business" was a far less noble basis for a civil-rights law, compared to a moral commitment to human equality, but it worked. So why did the coalition of interest groups opposing *Smith*, joined by Congress, prefer to anchor religious freedom on civil rights rather than the commerce clause, especially given the obstacle embodied by the fact that the decision the coalition sought to overturn was one of constitutional interpretation rather than one of statutory interpretation?[133] The answer is the coalition's reasoning that civil rights were by now so deeply rooted in American law that the Court would not reject a measure that guaranteed a right that most Americans regarded as inviolable. It was a reasoning, however, that turned out to be a big mistake.[134]

Washington, rather than the Judiciary Committee, then chaired by James Eastland, an anti-civil rights white supremacist from Mississippi. *Id.*

132. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). I use the terminology "little problem" advisedly because Justice William Douglas penned a concurring opinion in *Heart of Atlanta Motel* in which he indicated he would rest his decision both on the commerce clause and section five of the Fourteenth Amendment. *Heart of Atlanta Motel*, 379 U.S. at 279–80 (Douglas, J., concurring). Justice Douglas said his "reluctance" to rest solely on the commerce clause "is not due to any conviction that Congress lacks the power to regulate commerce in the interests of human rights. It is rather my belief that the right of the people to be free of state action that discriminates against them because of race, . . . 'occupies a more protected place in our constitutional stem than does the movement of cattle, fruit, steel and coal across state lines.'" *Id.* (quoting Edwards v. California, 314 U.S. 160, 177 (1941)).

133. The nature of the distinction is as follows. Overturning a decision is common in cases involving interpretation of congressional statutes, since the theory here is that because Congress wrote the statute, it has the right and power to amend the statute, when it believes the Court has misinterpreted it. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 230 (The Notably Trials Library 2005) (2001). In contrast, overturning or legislative revision of a constitutional decision is more difficult and much less common. *See id.* at 229–30. In these instances, short of an amendment to the Constitution, the Court has the final word on the Constitution's interpretation. *Id. Smith* was a decision of constitutional interpretation, not interpretation of a congressional statute. *Id.* at 230. The fact that the coalition proceeded to overturn in spite of this dilemma is why Professor Epps correctly assessed the strategy to overturn in this case as "audacious." *See id.* at 229.

134. *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555 (1984) (demonstrating an attempt to legislatively overrule a decision by the Supreme Court). *Smith* is not the first time in recent memory that Congress and the Supreme Court have engaged in this tangle. *Id.* In *Bell*, the Court ruled that only the specific department or program receiving government funds, not the institution as a whole, was barred from discriminating. *Id.* at 473–74. Despite Congress's attempt to restore and expand civil rights enforcement, the Supreme Court weakened it again. In *City of Richmond v. Croson*, a plurality of the Court held that past societal discrimination alone does not justify what it called a quota. *See* City of Richmond v. Croson, 488 U.S. 469, 499 (1989). The Court restricted minority contractor set-asides of state public works funds, something it had approved in 1980. *Id.* at 477. In 1991, Congress passed the Civil Rights Act, designed to reverse or alter a string of twelve decisions narrowing the scope of national civil rights protections that the conservative majority

B. *The American Indian Religious Freedom Act (AIRFA) of 1994*

A second consequence of *Smith* is the American Indian Religious Freedom Act (AIRFA) of 1994.[135] The act was an amendment to the American Indian Religious Freedom Act of 1978,[136] and ranked, along with the RFRA, as part of Congress's direct response to the second *Smith* case. Ideally, Congress enacted the RFRA to protect religious freedom for all Americans, Native Americans as well as non-Native Americans. However, a separate law for Native Americans was needed because the "RFRA, by its terms, addressed the legal problems of many religious groups potentially affected by *Smith II*," but failed to "clearly provide protection for" practitioners of peyote religion.[137] The movement for religious freedom that emerged in opposition to *Smith*, which included Congress, was interested in protection of religious freedom that did not necessarily embrace minority religions.[138] The answer to these problems was a separate law that would provide stronger and more specific statutory protection for the religious practices of Native Americans.[139]

That law was the AIRFA,[140] legislation sponsored by Senator Daniel Inouye (D-Hawaii). The statute provided, in pertinent part, that

> "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs."[141]

The law includes several exceptions, some of which are that it does not preclude the Drug Enforcement Administration from making "reasona-

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on the Supreme Court issued in the period between 1989 and 1991. President George H. Bush signed the bill into law after vetoing a measure the previous year similar to the one he signed. Only time will tell what the Supreme Court does with this law.

135. 42 U.S.C. § 1996 (1994).

136. *Id.*

137. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1016 (1998).

138. Why did Congress seem to work at cross-purposes, one part not interested in protecting minority religions, and the other part interested enough to realize the amendments here at issue? The answer is that Congress is a non-monolithic entity of two chambers and over 500 members susceptible to the demands of the innumerable interest groups in the society, pushing and pulling it in different directions.

139. *See generally* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291 (1996).

140. 42 U.S.C. § 1996 (1994).

141. 42 U.S.C. § 1996a(b)(1) (1994).

ble regulation and registration" of persons who cultivate, harvest, or distribute peyote; it does not preclude prison authorities from prohibiting access to peyote by Indians incarcerated in Federal or State prison facilities; it does not preclude States from passing and enforcing "reasonable traffic safety laws or regulations"; and that it does not preclude the Secretary of Defense from making "regulations establishing reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety, or compliance with international law or laws of other countries," provided such regulations are "adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice."[142]

The statute, in the list of findings underlying its passage, named *Smith* and indicated that the ruling "raised uncertainty whether the religious practice would be protected under the compelling State interest standard."[143] It also pointed out that "while at least [twenty-eight] States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, [twenty-two] States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies."[144] Congress also noted that "for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures[,]"[145] and that "since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation[.]"[146] It also finally found that "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment."[147] The effect of the law is that, "[f]or the first time in its history, the Native American Church stood on firm statutory ground."[148] But AIRFA allowed the federal government to decide the membership of the Native American Church.[149] This means, as Professor Epps pointed out, that the law would protect a challenger like Al Smith, but not Galen Black.[150] Carv-

142. *See* 42 U.S.C. § 1996a(b)(2)-(7) (1994).
143. 42 U.S.C. § 1996a(a)(4) (1994).
144. 42 U.S.C. § 1996a(a)(3) (1994).
145. 42 U.S.C. § 1996a(a)(1) (1994).
146. 42 U.S.C. § 1996a(a)(2) (1994).
147. 42 U.S.C. § 1996a(a)(5) (1994).
148. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 235 (The Notably Trials Library 2005) (2001).
149. *Id.* (citing 42 U.S.C. § 1996a(c)(1)-(3)) (defining the terms *Indian*, *Indian tribe*, and *Indian religion*).
150. *Id.*

ing out a separate law to protect the religious freedom of Native Americans proved a blessing in disguise for Native Americans in 1997 when the RFRA was struck down by the Supreme Court, and the AIRFA, being independent of the RFRA, was left untouched.[151] This is partly the sense in which, as Epps draws from the Scriptures "[t]he stone that the builders rejected has become the cornerstone" of God's house.[152]

C. *The 1991 Amendments to Oregon's Controlled Substances Act*

A third result of the *Smith* case consists of the amendments to Oregon's Controlled Substances Act. In rewriting the jurisprudence of the Free Exercise Clause in 1990, the Supreme Court stated that protection for minority religious freedom was something left for the political process,[153] implicitly inviting state legislatures to provide the protection for peyote religion that it could not grant. One of the first legislatures in the country to accept this invitation was the Oregon Legislative Assembly. In 1991, in its first meeting following release of *Smith II*, the Assembly amended Oregon's Controlled Substances Act designed to facilitate sacramental use of peyote. The law exempts from prosecution any defendant able to show, as an affirmative defense to a charge of peyote possession, that he or she possessed the peyote as part of a practice associated with a "good-faith religious belief," and that the intended use was safe for both the user and onlookers.[154] State Representative Jim Edmunson (D-Eugene) sponsored the bill and Al Smith helped lobby its passage.[155] Oregon's Attorney General did not take a position on the bill.[156]

In Oregon, the law provided a layer of protection to religious freedom for Native Americans beyond the AIRFA. It also added Oregon to the list of the dozens of jurisdictions that afforded exemption to "use, possession, or transportation," of peyote for religious purposes.[157] With this

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151. City of Boerne v. Flores, 521 U.S. 507 (1997).

152. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 240 (The Notably Trials Library 2005) (quoting *Psalms* 118:23-23 (reading: "The stone which the builders rejected has become the head of the corner. This is the Lord's doing; it is marvelous in our eyes.")).

153. *See* Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 890 (1990).

154. OR. REV. STAT. § 475.992(4) (West 2006) (outlining how the statute relates to the prosecution for the manufacture, possession or delivery of peyote).

155. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 234–35 (The Notably Trials Library 2005) (2001).

156. *Id.* at 235.

157. 42 U.S.C. § 1996a(b)(1)-(7) (1994). The clause in quote tracks the language of the American Indian Religious Freedom Act of 1994. *Id.* While *use* and *possession* seem obvious, *transportation* is also implicated in cases involving the use of peyote for religious purposes. *See, e.g.*, GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 117–18 (The Notably Trials Library 2005) (2001) (citing Oregon v. Soto, 537 P.2d

law, Oregon shed its dubious distinction as "the only state in the Union whose courts . . . reject[ ] a religious defense to its peyote statutes,"[158] and took an important step aimed at repairing its past insensitivity to minority religions. The initiative takes particularly sweet meaning when it is considered the alternative course Oregon could have chosen but consciously rejected in passing this law. The House of Representatives, in a report accompanying the RFRA that it compiled, stated,

> In terms of the specific issue addressed in *Smith*, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest.[159]

As Epps interprets this statement, "the drafters were saying, the *Smith* rule was being overturned–except maybe not for peyotists . . . . [T]his language in the committee report seemed to hint rather broadly that other courts should do the same."[160] Oregon deserves accolade for taking a course, as it did, that departed from this House invitation.

D. *The Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000*

The final aftermath of the *Smith* case, not treated in Epps's book, but included here as an update to the *Smith* story, is the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.[161] The act "is the latest of long-running congressional efforts to accord religious exercise

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142 (Or. 1975)) (involving Reginald Soto, a Native American adherent of peyote religion, pulled over by a state police car). Soto had a "medicine bundle" hanging from his rearview mirror. *Id.* at 118. The bundle contained dried out peyote button. *Id.* Like many Native Americans, Soto carried the button, not for ingestion, but to have his God near at all times, in the same way, for example, Roman Catholics would carry small statues or images of the Virgin Mary on their dashboards. *Id.*

158. *Id.* at 117. The case exemplifying this practice was *Oregon v. Soto* where the Oregon Court of Appeals ruled a defendant's free-exercise arguments irrelevant. In deciding not to consider such arguments, the court stated:

> Peyote and mescaline have been declared by the legislature to be dangerous drugs as a matter of law. The preservation of the health and safety of the people is the presumed purpose behind that legislative declaration and a valid and reasonable application of the criminal laws of the state. There is, thus, a compelling state interest. *Id.* at 118–19.

159. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 234 (The Notably Trials Library 2005) (2001).

160. *Id.*

161. *See generally* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 (2000).

heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents."[162] It signified Congress's response to the Supreme Court's invalidation of the RFRA in *Flores*. The RLUIPA has one key property the ill-fated RFRA lacked: it invoked federal authority under the Commerce and Spending Clauses. As the Supreme Court itself unanimously assessed in *Cutter v. Wilkinson*, the RLUIPA was "[l]ess sweeping than RFRA[.]"[163] The law has two parts: a section dealing with "protection of land use as religious exercise,"[164] and one on the protection of religious exercise of institutionalized persons.[165] The first protects property used by religious groups, including remedy for religious communities experiencing conflicts with zoning boards; the second protects religious practices of institutionalized persons, such as individuals in prisons and nursing homes. President Clinton signed the bill into law on September 22, 2000.[166]

Section three, the provision of particular interest and relevance here, provides, in pertinent part, that "'[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,' unless the burden furthers 'a compelling governmental interest,' and does so by 'the least restrictive means.'"[167] Section three was designed "[t]o secure redress for inmates who encountered undue barriers to their religious observances . . . ," and its passage followed congressional hearings spanning three years, documenting "frivolous or arbitrary" barriers that impeded the religious exercise of institutionalized persons.[168] The act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[169] Section three applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance," or "the substantial burden affects, or

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162. Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 (2005).

163. *Id.*

164. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 § 2 (2000).

165. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 § 3 (2000).

166. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 534 (2001).

167. Cutter v. Wilkinson, 125 S. Ct. 2113, 2114 (2005) (quoting 42 U.S.C. § 2000cc-1(a)(1)-(2) (2005)).

168. *Id.* at 2119 (summarizing the legislative history of section three). That history includes the anticipation of lawmakers that courts entertaining complaints under section three would accord "due deference to prison administrators' experience and expertise." *Id.* at 2115.

169. 42 U.S.C. § 2000cc-5(7)(A) (2005).

removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."[170] Under the Act, "[a] person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[171] In *Cutter v. Wilkinson*, the Supreme Court, per Justice Ginsburg, unanimously upheld this section against an Establishment Clause challenge by prison officials in the Ohio Department of Rehabilitation and Correction. The Court granted review in the case "to resolve the conflict among Courts of Appeals" on the question whether section three "is consistent with the Establishment Clause of the First Amendment."[172] The Court handily answered the question in the affirmative, incorporating the assessment, as indicated above, that the RLUIPA itself is "[l]ess sweeping than RFRA[.]"[173]

IV. THE IMPORTANCE OF THE EPPS'S STUDY

There are three elements to the importance of the Epps's work or study.[174] The first is a continuation of the commentary describing the book's general features. The second is a chapter-by-chapter description

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170. 42 U.S.C. § 2000cc-1(b)(2) (2005).

171. 42 U.S.C. § 2000cc-2(a) (2005).

172. Cutter v. Wilkinson, 125 S. Ct. 2113, 2115 (2005).

173. *See id.* at 2118. Justice Thomas was the only one of the nine judges who, in addition to voting with the Court, also authored a concurring opinion. *Id.* at 2125 (Thomas, J., concurring). Thomas agreed with the rest of the Court that the RLUIPA "is constitutional under our modern Establishment Clause case law," but concurred specifically "to explain why a proper historical understanding of the Clause as a *federalism* provision leads to the same conclusion." *Id.* (emphasis added). This is not the first time Thomas, who advocates an "original intent" of the Religion Clauses, is propagating his unique federalism interpretation of the Establishment Clause. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 676, 678 (2002) (Thomas, J., concurring) (stating that although States are bound to observe strict neutrality, they "should be freer to experiment with involvement [in religion] on a neutral basis than the Federal Government (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 699 (1970) (Harlan, J., concurring))); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (maintaining that "[t]he text and history of Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments," and indicating that the Clause "does not protect any individual right"). In *Zelman*, a five-Justice majority of the Supreme Court upheld a Cleveland, Ohio, school voucher program under which students were given government tuition aid, which could be used to attend public or private schools, including religious schools. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). In *Newdow*, a five-three majority of the Court rejected Michael Newdow's standing to challenge statutes exposing his daughter to daily recitations of the Pledge of Allegiance in her public school. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

174. The term *work* or *study* is used advisedly because the discussion here, as in other portions of this book review, is on the totality of Professor Epps's research on the *Smith*

of the book's contents or organization. The third and final portion is an articulation and analysis of three lessons that, in my assessment, individually and collectively bear on the book's significance.

A. *General Features of the Book*

Epps's book takes its title from a passage in the Holy Scriptures where the Apostle, St. Paul, preaching to the Athenians, commented on an altar the latter dedicated "to an unknown god."[175] It is a title that also resonates well with the remarks of the protagonist Smith about praying to "[a] God that [he] didn't even understand."[176] The resort to titles drawn from biblical passages for names of works is a tradition now well entrenched in American legal scholarship that the book under review taps into.[177] The cover of the book is graced by footage of a golden eagle feather descending or about to descend on some courthouse that resembles the building of the Supreme Court, both shrouded within the background of pre-storm clouds. An eagle "is one of the most sacred symbols in Native spirituality."[178] It is a symbol that speaks to the religious coloration of the dispute here involved, but also, as well, an invitation for Smith to step forward and represent Indian interests in the brewing lawsuit over religious rights. And when Smith accepted the large manila envelope with no return address that was put in his interoffice mailbox,[179] he also committed himself to fight.[180] An eagle feather, albeit quiescent rather than descending, is also the pictorial legend that graces the nonchaptered portions of the book, such as the "Note on Sources,"[181] "Notes,"[182] "Acknowledgments,"[183] and "Index."[184]

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case, as opposed to just the book under review, without in any way minimizing the importance of the book.

175. *See Acts* 17:22-23 ("Men of Athens, I perceive that in every way you are very religious. For as I passed along, and observed the objects of your worship, I found also an altar with this inscription: TO AN UNKNOWN GOD.").

176. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 19 (The Notably Trials Library 2005) (2001).

177. *See, e.g.*, DERRICK A. BELL, AND WE ARE NOT SAVED 3 (1979). The particular passage in the Bible inspiring Professor Bell's work is from the book of *Jeremiah*, which states in part that "[t]he harvest is past, the summer is ended, and we are not saved." *Jeremiah* 8:20. Less dramatically, Bell, in a recent work, called the United States Constitution "America's civil religion." DERRICK A. BELL, SILENT COVENANTS: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform 3 (2004).

178. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 110 (The Notably Trials Library 2005) (2001).

179. *Id.* at 109–11.

180. *Id.* at 110 ("If I accept these feathers, how can I not go [to a peyote ceremony]?").

181. *Id.* at 263–67.

182. *Id.* at 269–76.

The book is divided into a prologue and fourteen chapters. In addition to these features, the work also has a "Note on Sources," a type of bibliographical essay of secondary sources built primarily on interviews of the major parties in the litigation; "notes" or documentation; acknowledgments; and an index of the names and subjects covered in the work. One of the numerous persons Epps acknowledged in his book was David Frohnmayer, of whom Epps said: "Frohnmayer, first as my dean and then as president of the University of Oregon, has never tried to influence my views or conclusions about the case, which are substantially different from his own."[185] The prologue is a preview of two (out of the four) parties, the Smith and Frohnmayer sides, weighed in the balance, in this fateful lawsuit that "would come to define the limits of America's religious freedom."[186] Discussion relating to the organization of the rest of the book is saved for section IV.B. *infra*. As the presentation in that section makes evident, the discussion in the chapters well reflects and harmonizes with the title or theme of each chapter. Also, like the book's general title, many of the subtitles or themes–such as the "valley of the shadow," "the wisdom of Solomon," "five smooth stones," "appeal to Caesar," "sins of the fathers," "human sacrifice," and "Gideon's army"–are topics drawn from the Bible. Both general title and chapter themes, in turn, tie snugly into the book's subject matter of religious freedom. To crown and magnify these features, the book is, unlike much of traditional legal scholarship, readable. Prior to his present call and incarnation as law professor, Epps was a former reporter for *The Washington Post* and author of two novels. This background seems to have shaped the quality of the legal narrative embodied in the book as well as the readability of the work.

B. *Organization of the Work*

Chapter 1, titled "A God I Didn't Understand" provides details of Smith's personal life growing up among the Klamath people of southern Oregon. Native Indians are America's aboriginal population that White America considers "vanishing."[187] But rather than vanish, this one, who

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183. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 277–79 (The Notably Trials Library 2005) (2001).

184. *Id.* at 281–89.

185. *Id.* at 277; *see also id.* at 953 (disclosing that Frohnmayer "helped bring me to the University of Oregon," but also indicating that he "has been scrupulous about allowing me to come to my own conclusions while answering my questions fully.").

186. *Id.* at 7, 10.

187. Whites sometimes have tried to accelerate this "inevitable" process through various blatant and subtle means, one of them arguably the federal government's "termination" of the recognition of sovereignty accorded some of these Indian groups, as was the

grew up without a father, thrived enough to write his name into American history.[188] "When Americans in the 1990s talk about religious freedom, they are, whether they know it or not, talking about Al Smith."[189] Although born into a largely intact culture, Smith was, like generations of Indian boys and girls, torn away from his home and sent to boarding school to be assimilated into the American melting-pot. The result was that he grew up not learning his own language, and the history and rituals of his people. "Stripped of these things, he graduated from boarding school to alcoholism, petty crime, prison, and disease."[190] But after twenty years abusing alcohol, Smith, in January 1957, sought sobriety in the recovery program of Alcoholics Anonymous (AA).[191] One of the important steps in AA treatment requires the recovering alcoholic to seek help in a "higher power."[192] The higher power Smith embraced was an Indian Creator that, as a child, he remembered his grandmother praying to.[193] The title also sits and ties well with the general topic of the book, drawn from the Holy Scripture, about a tribute to an *unknown* god.

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case with the Klamath, who were terminated in 1976 and the rich timberlands of their reservation sold off. *Id.* at 10. The termination was withdrawn one decade later, in 1986, and federal government recognition reinstated. *See id.* at 49–52.

188. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 10 (The Notably Trials Library 2005) (2001). The bland name (Al Smith) that Smith received at birth is one that clashes with his appearance. *Id.* at 8. In his days serving table, Smith took on the nickname "Red Coyote" to match his Native features–and make up somewhat for his lack of an Indian name. *Id.* Smith worried that when he is dead, he will arrive at the spirit world and provide his name only for the spirit people to answer, "We never heard of any Al Smith." *Id.* at 9. As Professor Epps elaborated, Smith and other Indian children's not having a "true" name "is almost certainly a legacy of the 19th-century period of supervision by federal Indian agents, who decided that 'normal' American names would make record-keeping easier than the descriptive Klamath-language names their wards were accustomed to." Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 963 n.46 (1998).

189. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 10 (The Notably Trials Library 2005) (2001).

190. *Id.*

191. *Id.* at 46. Alcoholics Anonymous (AA) is an organization founded in June 1935 by Bill Wilson, "a former stockbroker who drunk away his career and nearly died from drinking." *Id.* at 101. Wilson wrote the Twelve Steps, regarded as the "big book" in AA program. *Id.* at 46. AA bases its alcoholic treatment and recovery program on abstinence, which are much more about ways of not drinking. *Id.* at 42.

192. *Id.* at 42. AA literature teaches that recovering alcoholics need to rebuild themselves from the ground up as moral beings. *Id.* It warns that becoming sober without undergoing a spiritual rebirth is far more agonizing and destructive than continuing to drink. *Id.*

193. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 955 (1998) (quoting Interview by Garrett Epps with Alfred L. Smith.) ("Finally, I got around to taking a look at the Twelve Steps, and I heard them read over and over at every [AA] meeting . . . [Y]ou have to turn your life over

Chapter 2, "Valley of the Shadow," presents the life story of David Braden Frohnmayer. "In worldly terms . . . Frohnmayer's life seemed worlds away from Al Smith's."[194] Born into a solidly middle-class home, "Frohnmayer early in life established a pattern of success that has hardly been broken since."[195] These include sound elite education, stable marriage, rewarding legal practice, a stint in legal teaching, and a successful dabble into politics culminating in election as attorney general in 1980, and reelection into the same position in 1988. As attorney general, Frohnmayer built a reputation "as a tenacious defender of the state's legal interests and an outstanding appellate advocate."[196] He was also an individual who "took pride in his office's reputation as a credible and serious advocate before the Court,"[197] and whose conduct in office for a time made him "the most popular and respected political figure in the state."[198] But all of these successes foreshadowed demons at home that the genial attorney general and his wife battled against, most evident in the affliction of their two daughters with Fanconi anemia (FA), a life-threatening genetic disorder.[199] These children later died from complications of the disease.[200] But there is something of a silver lining to these personal tragedies, embodied in the possibility that Frohnmayer may, in the end, be remembered as much for what he did as attorney general as

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to the care of God as you understand God. And I said, "Oh, well, screw that God." . . . But I'll try to remember my grandmother's God, because I could remember my grandmother used to pray in Indian every night, pray all over the house. So that will be my God, a God that I didn't even understand.)

194. *Id.* at 966 (going on to describe the tragic turn of events when Frohnmayer's three children were each born with a life-threatening disease).

195. *Id.*

196. *Id.* at 967.

197. *Id.*

198. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 968 (1998).

199. *Id.* at 966–67. Guido Fanconi, a Swiss pediatrician, is the namesake for the FA disease. *Id.* at 966 n.55. A recessive gene causes this extremely rare disease. *Id.* at 966. Because the bone marrow of individuals who have this condition over time ceases the creation of both red and white blood cells and of all platelets, the disease eventually causes bone marrow failure. *Id.* FA patients also have a higher incidence of leukemia and cancer than the general population. *Id.* By studying chromosomes doctors can diagnose the FA disease, which separate and rearrange easily in an FA patient. *Id.* at 966 n.55. A child whose parents both carry the recessive FA gene has a one in four chance of being born with the disease. *Id.* at 966–67 (drawing on LYNN & FROHNMAYER, FANCONI ANEMIA: A HANDBOOK FOR FAMILIES AND THEIR PHYSICIANS 3 (2d ed. 1995)).

200. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 247–48 (The Notably Trials Library 2005) (2001) (explaining that Kirsten, born in 1973, died in June 1997 and Katie, born in 1978, died in Sept. 1991). Frohnmayer left politics after Katie's death in September of 1991, and resigned his position as attorney general at the end of 1991 to become dean of the University of Oregon School of Law. *Id.* at 247.

for what he contributed and is contributing to the search for a cure for Fanconi anemia.[201]

Chapter 3, "The Last of the Klamaths," continues the story of Al Smith, focusing, this time, on what he did to earn a livelihood after embracing sobriety. The campaigns for Indian self-determination during the 1960s and 1970s led by the likes of the American Indian Movement (AIM) and Edison Chiloquin, produced many effects, including the restoration of tribal status to the Klamath, by Congress, in 1986; and the foundation of Sweathouse Lodge, an alcoholism and drug-abuse facility for Native Americans.[202] Rather than take his share of the money collected from the sale of timber in Indian reservations, Chiloquin, "the last of the Klamaths," this chapter used as theme, chose to build a tipi (some kind of shelter for peyote church services) and light a sacred council fire that he said would burn until the land taken from the Klamath people by white America had been restored to Indian ownership. Part of the results of these struggles was the incorporation of Indian religious practices, evident in traditions or institutions, such as sweat lodge,[203] the Sun Dance,[204] the Native American Church,[205] and peyote worship, into Na-

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201. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 967 (1998) ("In 1989, [Frohnmayer and his wife] founded the Fanconi Anemia Research Fund, Inc., to organize research and treatment efforts to deal with the disease . . . . While continuing to serve as attorney general, [he] also flew to medical conferences and research seminars, becoming a recognized lay expert on bone-marrow transplantation and diseases of the blood. He abandoned plans to run for governor of Oregon in 1986 in order to spend more time with his family and devote his energies to the search for treatments."). He later ran for that office in 1990 and lost. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 245 (The Notably Trials Library 2005) (2001).

202. *Id.* at 52–53 ("[The facility enabled Native people to] adapt[ ] the Twelve Steps, discarding the dominant-culture overlay in the field of treatment, and experimenting with their own spiritual traditions of treatment for the modern plagues of whiskey and drugs."). "Treatment at Sweathouse Lodge lasted [ninety] days." *Id.* at 53. As coordinator, Smith's job was "to meet with new clients, orient them to the program, and assign them to a counselor." *Id.* Smith also brought in Stanley Smart, the Road man or peyote ceremonial leader who introduced tipi (church services at which peyote was served as sacrament) at Sweathouse Lodge. *Id.* at 65. Professor Epps assessed that the facility was "a vibrant experimental facility that probably could not be re-created in today's insured, regulated, professionalized environment." *Id.* at 53.

203. *See id.* at 46 ("Indian people all over North America—everywhere except for the desert Southwest—had known and used the sweat lodge for hundreds of years. It was a way of purifying the body and the spirit; the sweat seemed to carry off much of the dross of daily life, leaving those in the lodge strengthened in their efforts to change and improve.").

204. *See id.* at 2, 54 ("A four-day event, it is usually not open to spectators or casual seekers. Dancers cut a sacred tree and carry it into a circular arbor, where they erect it in the center. The next day at daybreak, the dancers gather and tie colorful 'prayer ties' to the tree, and dancing begins. Men who are not dancing gather around a sacred drum, while women sing to accompany the dancing."). Native people find the dance "a powerful

tive treatment programs. As an alcoholism counselor, Smith became familiar with and used these experimental programs or practices, all of which helped solidify his Indian personality and rooted-ness in Native tradition and religion. This chapter also incorporates a useful discussion on the nature of Indian religion and the tendency by white Americans, going back to Thomas Jefferson, to view Native religion as "devil worship," rather than real religion. Further discussion on this point is saved for Part IV.C.3, focusing on insensitivity to minority religions.

Chapter 4, "East of Eden," continues the story of Frohnmayer started in Chapter 2, from a new angle. Specifically, it is the story of a religious commune, Rajneeshpuram, in Antelope, western Oregon, whose activities in the guise of religion consumed Frohnmayer's time during his first term in office as attorney general and shaped his view about how religion change, something that, in turn, both influenced his response to the *Smith* case and formed the basis for his "killer argument" during oral argument in the case at the U.S. Supreme Court. The commune took its name after Bhagwan Shree Rajneesh, an East Indian philosopher and supposed "holy man", whom his followers considered a "progressive guru." The group incorporated the ranch it established its commune on into a city to get around Oregon's stringent land-use regulation system. Following the incorporation, the leaders of the commune changed the name of the city from Antelope into Rajneesh(puram) and renamed its streets after Hindu holy men. "The Rajneeshees wanted to be left alone, but they persisted in persecuting those around them; when they got their hands on power, they used it as a club against anyone who differed from them. They screamed that their enemies were bigots while they themselves deployed election fraud, poison, and germ warfare."[206]

In response to the request of an Oregon legislator, Frohnmayer wrote an attorney general's opinion that ruled that the incorporation of Rajneeshpuram as a city violated the federal and state constitutions and being unconstitutional, the city must cease to exist. Frohnmayer based his

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expression of healing and union with the earth." *Id.* But it is also a tradition most whites do not understand, and that some white missionaries for some reason considered frightening or ungodly. *Id.* Sun dances were forbidden on reservations, but the ritual survived in secret–until the 1960s and 1970s when it emerged as one of the most sacred expressions of the new Indian spirituality. *Id.* at 55.

205. *Id.* at 55. Its name which suggests one un-variegated entity is a misnomer, since the Church "is actually a very loose confederation of denominations with differing ceremonies and beliefs." *Id.* Just like the Sun Dance operates semi-underground, this institution, "has kept a low profile by intent, both in American society generally and in Indian country" for one reason: "Many whites and Native people alike object to its ceremonies because they involve peyote." *Id.*

206. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 89 (The Notably Trials Library 2005) (2001).

opinion on the U.S. Supreme Court's decision in *Larkin v. Grendel's Den.*[207] The opinion concluded that Rajneeshpuram "is the functional equivalent of a religious commune."[208] And as a religious body, it was not eligible for any state funding: "[t]he state and federal constitutions do not permit the road to Damascus to be paved with public funds."[209] In the aftermath of this opinion, Rajneesh and his followers were convicted of or pleaded guilty to various offenses unrelated to free exercise of religion and their community put on the real-estate market. For Frohnmayer and many Oregonians, "the rise and fall of Rajneeshpuram framed the issues of religious freedom and government neutrality in a stark and unforgettable way."[210] The experience brought home to Frohnmayer "the wisdom of the religion clauses," along with "the danger of the establishment of a religion."[211] It convinced him that "religion could be a force for evil as well [as] for good and that, no matter what religious leaders claimed about the purity of their motives, the state might need to watch them carefully indeed."[212] Epps assessed that Rajneeshpuram did not end "in fire and blood," as was the case in places like Waco, Texas, due largely to the "caution and adroitness" of Frohnmayer and other Oregon's authorities.[213]

Chapter 5, "The Eagle Feather," traces the evolution of the controversy that would form the lawsuit *Employment Division v. Smith.*[214] It is about all the original parties, Smith and Black, as employees, and Alcohol and Drug Abuse Prevention and Treatment (ADAPT), as employer, and the dispute over religious use of peyote that led to the relieving of the two employees of their positions as alcoholic counselors. The controversy would not have taken place–and the *Smith* cases would not have entered into the constitutional history book–if ADAPT had stopped short after firing Smith and Black. Instead, the agency (pig-headedly) proceeded to oppose the dismissed employees's unemployment claims. The case would also not have happened if Smith and Black had not

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207. 459 U.S. 116 (1982) (invalidating a Massachusetts law that gave churches and schools the power to veto the issuance of liquor licenses to restaurants within 500 feet of the church or school building as direct delegation of political power to a religious body, "enmesh[ing] churches in the exercise of substantial governmental powers").

208. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 80 (The Notably Trials Library 2005) (2001).

209. *Id.*

210. *Id.* at 67.

211. *Id.* at 88.

212. *Id.* at 89.

213. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 67 (The Notably Trials Library 2005) (2001).

214. 494 U.S. 872 (1990).

met[215]–and there would have been no invitation, signified by the eagle feather to Smith that formed the theme of this chapter, to represent Indian interests. There are several points that make this chapter significant. The previous chapters have been about Frohnmayer and Smith. This chapter brings into the discussion Black and ADAPT, the necessary parties in the dispute over unemployment that led to the *Smith* case. The other lessons, bearing on significance, are saved for Part IV.C.1, where the topics properly belong.

Chapter 6 is entitled "Freedom of 'Religion.'" The chapter discusses different respects, beginning with the misspelling of *religion*, in which the Oregon provisions relating to religious freedom, differ from the one embodied in the federal constitution. The drafters of the Oregon constitution of 1857 were less educated than the framers of the United States constitution—one reason, for example, why they spelled *religion* incorrectly. But they were also less idealistic individuals whose political philosophy revolved around "majority rule," to the relegation of minority rights. Their greater pragmatism is evident in the differentness between their guarantees for religious freedom, compared to the provisions embodied in the First Amendment to the United States Constitution.[216] The pragmatism sired a vision of the state as a "neutral" force in religion, specifically the view that the state has fulfilled its constitutional duty with respect to religious freedom simply by disassociating itself from religion and religious bodies altogether.[217] The State could find it has been drawn into something unwanted by an apparently harmless exception to one of its laws.[218] Several cases, old and recent, embody this trend. These include *Pierce v. Society of the Sisters*,[219] decided in the first quarter of the twentieth century, where the state defended its anti-Catholic initiative on the ground that it did not favor any one denomination over another.

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215. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 96 (The Notably Trials Library 2005) (2001). Whether it was due to the sweat lodge or Smith's general personality, "[o]ne person who responded to Al Smith's talk about Native religion was Galen Black." *Id.*

216. *Compare* U.S. CONST. amend. I (providing for "the free exercise of religion"), *with* OR. CONST. art. I, §§ 2, 3 (protecting the freedom "to worship Almighty God," "the free exercise and enjoyment of religeous [sic] opinions," and the rights of conscience); *compare* U.S. CONST. amend. I (prohibiting the government's "establishment of religion"), *with* OR. CONST. art. I, § 5 (stipulating that "[n]o money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religeious [sic] services in either house of the Legislative Assembly").

217. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 969 (1998).

218. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 128 (The Notably Trials Library 2005) (2001).

219. 268 U.S. 510 (1925).

More recent cases evidencing this trend of strict neutrality are *Salem College & Academy v. Employment Division*,[220] and *Oregon v. Soto*[221] decided in 1973. In *Salem College*, the Oregon Supreme Court ruled that only the legislature, not the courts, has the power to make exemptions to tax laws that exempt independent religious schools.[222] The case laid down a sweeping rule by which, under the Oregon religion clauses, the state could not exempt some religions and not another or otherwise distinguish between or amongst religious groups that had different structures, behaviors, and beliefs. Instead, the state must treat all groups as equal, i.e. "if one group got a special deal, then all had to get the same deal."[223] The decision "threw Oregon's unemployment system . . . into chaos until the legislature could assemble and write a statute that satisfied both the Oregon constitution and the federal law."[224] In the second, the same court rejected a religious defense to its peyote statutes. In so doing, Oregon became the only State in the Union to reject this defense. The occurrence also set it apart from states like California, where, going back to 1964, in *People v. Woody*,[225] the government allowed that defense.

The revival of state constitutional law, instigated by Justice Brennan during the 1970s, ironically served to reinforce the State's neutral view of religious rights. The orientation led to the emergence of a complex and sophisticated body of case law that interpreted the Oregon constitution "as a first resort,"[226] an occurrence "breathing new life into the Oregon constitution."[227] One of the signature decisions of this period was the *Salem College* case. What is ironic about the strict neutrality the revival movement sired was that it led to less solicitude for religious rights rather than embrace the expansive trend in federal jurisprudence represented by *Sherbert* and its progeny. Justice Brennan advised activist lawyers to first look to their state constitutions when bringing claims because the federal judiciary had turned conservative. But Oregon, led by individuals like Justice Hans Linde of the Oregon Supreme Court, adopted revivalism to promote a non-expansive view of religious rights and one less solicitude of non-mainstream religions.

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220. 695 P.2d 25 (Or. 1985).

221. 537 P.2d 42 (Or. 1975).

222. Salem Coll. & Acad., Inc. v. Employment Div., 695 P.2d 25 (Or. 1985).

223. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 128 (The Notably Trials Library 2005) (2001).

224. *Id.* at 127–28.

225. 394 P.2d 813 (Cal. 1964).

226. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 971 (1998).

227. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 124 (The Notably Trials Library 2005) (2001).

Chapter 7 titled "The Wisdom of Solomon" analyzes the unemployment compensation dispute of Black and Smith against ADAPT, the agency, once their employer that opposed their receipt of unemployment compensation, before the Employment Division of the Department of Human Resources in Roseburg, Oregon. The Solomonic wisdom the chapter refers to was that of Robert Gruber, a hearings officer in the department whose job involved refereeing challenges to state agencies' decisions. Just as the biblical Solomon in his ruling in the case of the two women contending over a child would split the child so each woman gets a portion, Gruber's decisions were a compromise that gave something to each of the parties. The two employees, in ingesting peyote in religious ceremonies, the referee ruled, engaged in "a willful violation of reasonable standards of behavior which the employer had a right to expect," but under the precedents the Supreme Court established in *Sherbert* and *Thomas*, Oregon had no "compelling interest" that would permit it to deny them unemployment benefits.[228] Gruber's ruling has all the appearance of a reasonable middle ground that would have resolved the dispute. However, ADAPT refused to settle for anything less than full vindication, which for it meant denial of unemployment benefits to Black and Smith. Accordingly, the agency appealed the rulings in 1984 to the Oregon Employment Appeals Board, the administrative body that reviewed all decisions by hearing officers. The board found against Black and Smith.[229] The denial of compensation made Black and Smith "aggrieved parties" and gave them the right, under Oregon civil procedures, to appeal the rulings directly to the Oregon Court of Appeals, and from thence to the Oregon Supreme Court. Meanwhile, the Equal Employment Opportunity Commission (EEOC), accepted the complaint against ADAPT for wrongful discharge and discrimination. ADAPT settled the EEOC claims, leaving the issue of religious freedom unresolved.

Chapter 8, titled "Five Smooth Stones," discusses the rulings of the Oregon Supreme Court, which decided in favor of the plaintiffs and against

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228. *Id.* at 140. This was actually the ruling with respect to Smith. For Black, Gruber ruled "the claimant's use of peyote was cause for great concern by the employer," but that the "action was nonetheless an isolated instance of poor judgment[ ]" that "such incidents do not constitute misconduct under [Oregon administrative rules]." *Id.* Speaking further to the non-compelling nature of the evidence, the referee also pointed out that the record "developed during the hearing had *not* suggested that false claims of peyotism were a widespread problem." *Id.* (emphasis added).

229. *Id.* at 142. For Black, the board disagreed with the referee's finding that the employee's action amounted to an "isolated act of poor judgment." *Id.* Instead, his actions in "violating the employer's rules" are so serious he committed "misconduct" and is therefore not entitled to benefits. *Id.* For Smith, it ruled that "the use of mescaline is illegal in Oregon," and that the religious context was simply irrelevant. *Id.* Mescaline is one of the psychoactive ingredients in peyote.

the Employment Division. The court ruled that the agency's action that denied plaintiffs benefits did *not* violate the Oregon religion clauses (given the state constitution's strict neutrality toward religions), but that the denial was not compelling under the *Sherbert* test and therefore violated the Free Exercise Clause of the United States Constitution. Despite the imbalance in legal resources between the plaintiffs on the one hand and the Attorney General's Office on the other, "Al Smith and Galen Black were now truly in the position of David, the shepherd boy armed with only a slingshot and five smooth stones who went forth to fight a ten-foot-tall giant."[230] This was not good news for Frohnmayer who believed these decisions "compromised the state's interest in controlling the use of hallucinogenic drugs."[231] This was the scenario in which the attorney general requested and received the United States Supreme Court permission to review the case. Still, members of the Native American Church could have averted the brewing lawsuit if the Oregon Board of Pharmacy would have adopted a rule exempting from its list of illegal drugs the sacramental use of peyote. Instead, the Board amended the rules regarding controlled substances creating an exemption for the Native American Church members to use peyote for non-drug purposes.[232] However, they quickly withdrew the change upon the pressure of the attorney general, on the ground that the exemption would amount to an unconstitutional establishment of religion in Oregon.

Chapter 9, "Appeal to Caesar," focuses on the oral arguments before the Court in *Smith I*. The "Caesar" the chapter refers to was no one else but Justice Scalia, who filled the position left open when William Rehnquist was elevated to Chief Justice, and whose growing influence on the Court the chapter dwells on. "Scalia had every reason to consider himself the leader of a growing army of reliably conservative judges who would set constitutional policy for a generation to come."[233] The strength of his participation in *Smith I* was also proof of his continuing influence as intellectual second-in-command to Rehnquist as a member of the conservative wing of the Court.

Chapter 10, "Sins of the Fathers," deals with the reactions by groups, Native Indian and non-Native Indian, attending the decision by the attorney general to seek a review following the remand of *Smith I* and the Oregon Supreme Court's reaffirmation of its holding to the effect that the First Amendment entitles Black and Smith to unemployment compensa-

230. *Id.* at 150.

231. *See id.* at 210.

232. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 154 (The Notably Trials Library 2005) (2001).

233. *Id.* at 166.

tion. These groups worried that "the wrong result in Washington might harm Indian religions around the country."[234] Compelled by pressure from several quarters, including Native Indian friends, Frohnmayer tried to settle the case out of court, but the litigants, who did not have any attorney-client relationship with the Native American Rights Fund in Boulder, Colorado, an organization representing tribal governments and Native organizations in the United States, found the settlement term unfavorable and refused to settle.

Chapter 11, "Human Sacrifice," is the story of the event of oral argument in *Smith II* before the United States Supreme Court. Frohnmayer presented his "killer argument" about how religions change and how, therefore, peyote religion, even if safe now, might become unsafe in the future, if granted affirmative constitutional protection. Lawyers for Smith and Black had good counter-arguments, but the tenor of question from the justices, particularly Justices O'Connor and Scalia, suggested that the respondents could not win. Scalia posed a hypothetical about human sacrifice, from which this chapter draws its theme that observers considered disrespectful to Native Americans and their religion.[235] The chapter also makes the important point that, in retrospect, the oral argument

> was mostly striking for what was not said. Not one word from counsel, not one question from the bench suggested that this case turned on anything except the appropriate application of the *Sherbert* "compelling interest" test. . . . Since its petition for certiorari . . . the state had not even suggested a new look at *Sherbert.* All the briefs in the case took the test for granted, and no justice had suggested otherwise.[236]

Chapter 12, titled "Incidental Burdens," presents an excellent and exhaustive discussion on the decision in *Smith II* that the Supreme Court released on April 17, 1990, which decision, as indicated in this book review, many berated for "tak[ing] away religious freedom."[237] The rule on "neutral, generally applicable laws" is one that was also strongly contested within the Court itself, although, as Professor Epps cannily shows,

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234. *Id.* at 189.

235. *Id.* at 213. Craig Dorsay, attorney for Smith and Black, tried to argue that a "state could not outlaw a religious practice without showing that it caused actual harm" when Scalia cut him off with, "Well, I suppose you could say a law against human sacrifice would, you know, would affect only the Aztecs. But I don't know that you have to make . . . exceptions. If it is a generally applicable law." *Id.*

236. *Id.*

237. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 215 (The Notably Trials Library 2005) (2001).

Justice O'Connor, whose concurrence in the case read like a dissent, is a "former state judge with a hardline view of drugs," who had little appetite for peyote religion.[238]

Chapter 13, titled "Gideon's Army," analyzes the fall-outs from the second *Smith* case, which fall-outs or aftermaths, including events not covered in the Epps's book, Part III of this book review comprehensively analyzes. An important element of those aftermaths, which formed the theme of this chapter, was whom the fragile coalition, which emerged in opposition to the *Smith* case, *ex*cluded. "Like Gideon in the Bible, the coalition felt the need to send away some of its potential recruits."[239] As indicated before in this book review, the coalition was only interested in restoring the compelling interest test, not in protecting peyote religion. Its goal was to achieve protection for "mainstream" religions, while leaving minority religions, such as the Native American Church, in the cold. The coalition rejected the request by the leadership of the Native American Church to adopt, "as one of its objectives the repeal of *Smith* as it applied to states' power to ban possession and use of sacramental peyote" on the grounds that "peyote was controversial."[240] It was a response Native Americans, understandably, viewed as ominous. As one Native American leader recalled, "[t]hey asked the [Native American] church to basically get their own coalition, get their own law. We felt snubbed."[241] Epps wrote, "[w]ith the losers in *Smith* safely in the background, the new religious army marched into battle with a sound of trumpets."[242]

Chapter 14, titled "Simple Gifts," presents an update on how, since the *Smith* cases, all the four quarreling parties (including John Gardin, former head of ADAPT) moved on with their lives. Smith, now eighty-something years old, is honored for his option to stand up and fight rather than run away. There was no reason to ever worry that he would do something–like turn away from a fight–that would make his children say "[o]h, he's the guy that sold out."[243] And the fear is also banished for all times that when he departs into the spirit world, his spirit people would not recognize his name. Instead, he was the culture hero who, even though warned, for example, that "he cannot win or that he should not win or that he is too unimportant to fight the giant with only his five smooth stones," still stood to fight "when the battle c[a]me[ ] uninvited to his doorstep," strong in the knowledge that "no good comes from running

238. *See id.* at 223.
239. *Id.* at 230.
240. *Id.*
241. *Id.* at 230–31.
242. *Id.* at 231.
243. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 204 (The Notably Trials Library 2005) (2001).

away."[244] Black still agonized that the real story of the *Smith* suit is yet to be told. He still saw the dispute as a quarrel over how to treat Native American alcoholics and still believed that "he was fired for doing his job."[245] He is dismayed that "Oregon does not offer peyote religion as a therapy for alcohol and drug abuse among its Native people."[246] Instead, the treatment facility Sweathouse Lodge, in Corvaliis, one of the monuments of the victories Native people won during the American Indian Movement (AIM) upheavals of the seventies, had closed, "and nothing ha[s] taken its place."[247] The chapter is themed around Frohnmayer and the spotlight is on him and the major realignments that took place in his life, including the loss of his two daughters to Fanconi Anemia, and his departure from politics and option for life in academic administration, first as dean of the University of Oregon law school and later as president of the entire university system, while still retaining his position as professor in the law school. The title "simple gifts" that graced this chapter was the Shaker hymn performed at the funeral of his daughter, Kirsten, the second of two daughters to die from complications from Fanconi Anemia.[248]

In sum, judging from its plan or organization, Epps's book may be said to be divisible into two parts and two time periods, each, incidentally, of seven chapters: the course of events in the period when the litigation was a local affair limited to Oregon borders, and occurrences from the period the litigation went national. In the first period, the quarrel was mostly a controversy over unemployment compensation, with religious over- or undertones.[249] The materials in the book devoted to this first period are in Chapters 1-7. In the second period, the quarrel metamorphosed into a controversy over religious freedom that originated as unemployment claims. The materials in the book devoted to this latter period are Chapters 8-14.

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244. *Id.* at 257.

245. *Id.* at 277. Black's belief that the "real story" of the Smith controversy has not been told is such that, as Epps indicated in his acknowledgments, "Galen Black is at work on his own memoir of his experience with ADAPT." *Id.* There is no sign that the memoir has come out.

246. *Id.* at 251.

247. *Id.* at 53.

248. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 249–50 (The Notably Trials Library 2005) (2001).

249. *See e.g., id.* at 175 (stating that *Smith I* "seemed to be a routine unemployment-compensation case, with the slightly exotic addition of Native religion[,]" that initially "attracted little notice from the press or Court watchers.").

C. *Three Lessons Bearing on the Significance of the Book*

Three inter-related lessons individually and collectively bearing on the significance of the book are (1) the gulf in misperceptions and miscalculations that erupt into conflict; (2) the problem of majority insensitivity to minority religions; and (3) the nature of the relationship between the First and Fourteenth Amendments that the dispute exemplifies or illustrates.

1. Gulf in Perceptions and Miscalculations that Erupt into Conflict

The first lesson, pointing to the significance of the book under review, revolves around misunderstandings among the parties in a dispute that can lead to conflict. Scholars have written about misperceptions–and miscalculations–among actors in international relations that build up and lead to conflicts, even wars.[250] Similar misunderstandings that erupt into conflict can and do occur in non-international settings. The controversy that culminated in the *Smith* case is a good case in point. Distorted reading of the "evil" intentions of "the other side"[251] is key in figuring out an answer to the question, "why the state of Oregon, in the person of Dave Frohnmayer, fought so long and so hard against allowing unemployment benefits to two obscure former alcohol- and drug-abuse counselor," and "the tenacity with which both sides pursued a dispute over a small amount of money."[252] Numerous instances of misperceptions, ending in conflict, occurred in the interactions between ADAPT and its two former employees, as well as between Frohnmayer and Black and Smith, from the moment the Attorney General's Office became involved in the dispute.

i. Misperceptions in the Interactions Between ADAPT and Its Two Former Employees

ADAPT believed that the use of peyote for church services by Smith and Black changed its ability to counsel clients.[253] I look first at the nature of the interactions, leading to conflict, between the agency and Smith on the one hand, and next the interactions of the agency with Black, on the other. In telling Smith not to attend peyote ceremonies, ADAPT

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250. *See, e.g.*, JOHN A. STOESSINGER, WHY NATIONS GO TO WAR 251–65 (8th ed. 2001) (listing misperception of the parties, distorted views of the adversary's character, and parties' misperception of their adversary's power, among others, as precipitating factors in why nations go to war).

251. *See generally id.*

252. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 120 (The Notably Trials Library 2005) (2001).

253. *See id.* at 117.

chief executive John Gardin was ardent in his defense of the treatment program's integrity.[254] But Smith saw matters differently: *that he can't go to church.*[255] Smith's personality did not help matters one bit. For example, Smith was somebody who did not fool around with white people, particularly young white men who "reek of dominant culture."[256] More specifically, he was a person, in a "lifelong fight for spiritual autonomy,"[257] who "[s]ince his days in Indian school, had learned never to walk away from a fight, never to give in to the *spiritual demands of American life.* Even when the issues were not clear, the stakes, to Al Smith, were life itself."[258] Moreover, this was a fight he has not craved for, but rather that "c[a]me[ ] uninvited to his doorstep."[259] Nor did Smith's assessment of unending oppression in the history of Native American interactions with the majority white population help matters in any way. When Gardin terminated his appointment, Smith not only protested: "[y]ou go to church, and then you get terminated,"[260] he also blamed the matter on "a continuation of being put down, of my people and our religion not being recognized by you newcomers."[261] Epps wrote, "Indian people, as a rule, don't much like to be told what to do by white people. And if that's true in general, it's triply true of Al Smith, who had survived for nearly seventy years by sheer stubbornness, a stern refusal to bow down."[262] All the points above going to Smith's personality bespeak his assessment of white domination perpetrated against Native Americans. Stated somewhat differently, his personality in large part was shaped by his assessment of white domination of Native Americans. This is also an observation that points to the interconnectedness between discrimination against minority religion and racism, discussed in the section that follows below. A meritorious objection, in fairness to ADAPT, would be that Smith was not hired because of his Native background, but because ADAPT assessed he had job qualities, including the asset afforded by his

254. *Id.* at 106.

255. *See id.*

256. *Id.*

257. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 107 (The Notably Trials Library 2005) (2001).

258. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 964 (1998) (emphasis added); *see also id.* at 1009 (stating, whether it was "with white people, with white religion, with alcohol, with disease," whatever it was, Smith fought rather than walked away from a fight, and it "was the legacy he wanted to leave to his children").

259. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 257 (The Notably Trials Library 2005) (2001) (emphasis added).

260. *Id.* at 111.

261. *Id.*

262. *Id.* at 102.

twenty-five years sobriety, that "would appeal to Native and Anglo clients alike."[263] Smith also knew full well that ADAPT would not consider peyote as a alcohol treatment form.[264] But an equally meritorious counter-argument would be that it is not asking too much to expect an agency like ADAPT, which systematically reaches out to Native Americans, the largest minority population in the county in which the agency was located,[265] to strive to accommodate the sincerely-held religious practices of its otherwise dedicated employees.

As to ADAPT and Black, ADAPT again saw the issue as boiling down around treatment philosophy.[266] Gardin, chief executive of ADAPT, told the referee who tried unsuccessfully to mediate the dispute, "[t]he issue again is the ingestion of a drug, an illegal drug. Even if Galen believed it was legal, by a recovering person, in any amount, we consider unacceptable from a treatment perspective."[267] To Black, in contrast, the issue was his freedom of religion, particularly his freedom to pursue the "Native American way."[268] Black believed he was fired for doing what he was hired to do, namely, "offer counseling in a multi[-]cultural manner so as to make it effective for people of different backgrounds," and doing it well.[269] For him, "the primary issue" in the Smith controversy was that "a dedicated drug counselor was fired for doing his job in a creative and conscientious way," and he was at a loss about the dispute's transformation beyond these essential boundaries.[270] Black believed peyote might be just as therapeutic and helpful for Native American clients the same way Antabuse, the chemical the facility used to induce nausea when patients drank, is therapeutic and helpful for non-Indian clients; his role as drug counselor, as he understood it, was that "we are obligated to provide those people [Indian drug patients] their culturally specific treatment."[271] Told by Gardin to accept one of three options among returning to a lower-level job, resigning, or being fired, Black rejected all three, blurting out: "There's a court option, because what you're doing is simply racist discrimination."[272] As the referee who attempted to mediate the dispute

263. *Id.* at 94.

264. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 94 (The Notably Trials Library 2005) (2001) ("When I went to work for them, did I consider ADAPT would consider peyote a drug? Yes.").

265. *See id.* at 93, 99.

266. *Id.* at 135.

267. *Id.* at 137.

268. *Id.* at 135.

269. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 134 (The Notably Trials Library 2005) (2001).

270. *Id.*

271. *Id.* at 99.

272. *Id.* at 108.

recalled, "if ever two people were talking past each other, John Gardin and Galen Black were."[273] Knowledge of Native spirituality was the credential that Black believed would make him more valuable to his employers.[274] Here too, as with Smith, personality or life experiences did not help matters a bit, though to a lesser degree than Smith who rankled over white mistreatment of Native Americans: His new way of life was one which he would not abandon.[275] To the very publication of the book under review, Black remained unconvinced that the "real" story of what happened in *Smith* had been told and believed he needed his own separate story or memoir to relate that real story.[276]

ii. Misperceptions Leading to Conflict that David Frohnmayer Contributed

The gulf and crisis in perceptions that characterized the *Smith* controversy did not experience any narrowing from Frohnmayer's involvement in the case. If anything, the attorney general's participation made matters worse. First, Frohnmayer was a "tenacious defender of the state's legal interests,"[277] who perceived the claims as brought forth by drug reformers and civil libertarians.[278] Another blinder impeding perception, laying the ground for conflict, was the attorney general's conviction that Oregon would be in a "major world of hurt" if Oregon granted exemption for religious use.[279] Until the case went to the U.S. Supreme Court the second time, Frohnmayer underestimated Al Smith and Galen Black.[280] In seeking the Supreme Court's review a second time in the case, he also ignored advice from a cross-section of Oregonians, including former colleagues in the University of Oregon law school, who counseled him not to seek certification, out of a well-founded fear that the wrong result in Washington might harm Native American religions around the coun-

273. *Id.* at 135.

274. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 99 (The Notably Trials Library 2005) (2001).

275. *Id.* Epps wrote that Black "is, in his way, an American original, a spiritual seeker who is also a genuine rolling stone," who, by the time he sobered up, took "on the weather-beaten look of a man who has spent a lot of time on lonely roads . . . . This is a man who has had some hard traveling to get where he is." *Id.* at 96–97.

276. *See id.* at 251, 277.

277. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 967 (1998).

278. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 128–29, 148 (The Notably Trials Library 2005) (2001).

279. *Id.* at 189 (quoting Frohnmayer, who, in referring to the Oregon Supreme Court's response to the United States Supreme Court's remand of *Smith I*, stated, "[i]f we couldn't take that case off the books, we were in a major world of hurt").

280. *See id.* at 128–29.

try.[281] Like with Smith and Black, Frohnmayer's personality could also have been a factor contributing to misperceptions, as these insightful words illuminate:

> Lawyers–all lawyers–like to win their cases; they are a self-selected and carefully trained group of gladiators who fight for their clients' rights as if their own lives depend on it. Lawyers also come, by the working of human nature, to believe in the absolute rightness of their cause. *And even among lawyers, Dave Frohnmayer was an unusually determined advocate.* The same determination he brought to the fight against Fanconi anemia found its way into even routine cases under his official jurisdiction.[282]

2. Insensitivity to Minority Religions

Another lesson from the *Smith* case, pointing to the significance of the book, concerns insensitivity to minority religions. In *Lyng v. Northwest Indian Cemetery Protective Association,*[283] the Supreme Court, per Justice O'Connor, ruled that the Free Exercise Clause does *not* prohibit the government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three Native American tribes in northwestern California.[284] Justices Blackmun, Brennan, and Marshall dissented from the judgment of the Court.[285] Professor Epps painted a picture of the sacredness the three tribes in question, the Karok, Tolowa, and Yurok peoples, attached to the property here at stake:

> Since time out of mind, the three tribes had viewed this "high country" as the home of the spirits who lived on earth before the emergence of humans and who lingered on, hidden in rock formations, streams, and stands of virgin forest, to watch over the earth and its people. All three bands believed that regular rituals in the high country were what kept the earth in harmony. . . . In addition, Indian shamans and curing doctors used the high country as a retreat where they could receive power from the spirit world. Old people hiked laboriously into its high recesses to pray for renewal of their health. Young people went there to acquire power and see visions.

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281. *See id.*

282. *Id.* at 120 (emphasis added).

283. 485 U.S. 439 (1988).

284. *See generally* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

285. *See id.* (Brennan, J., dissenting). Justice Kennedy took no part in the decision. *Id.*

For these three bands, the high country was the Wailing Wall, the Basilica of Guadelupe, and Mecca rolled into one.[286]

The Court reasoned, "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[287] Justice O'Connor acknowledged that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices[,]"[288] but contended that the land in question was government land, and Native Americans had no right to tell the federal government what to do with "what is, after all, *its* land."[289] Therefore, she said, strict scrutiny did not apply at all because the burdens here, in her assessment,

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286. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 190 (The Notably Trials Library 2005) (2001) (emphasis added).

287. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 440 (1988).

288. *Id.* at 451. This is familiar territory for Justice O'Connor who had a tendency, in her opinions, to acknowledge problems but refuse remedy. *See, e.g.,* City of Richmond v. Croson, 488 U.S. 469 (1989) (stating that the Court had "no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs," yet ruling the race-conscious program for minorities at issue in the case unconstitutional); *and* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (calling "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country . . . an unfortunate reality," yet imposing strict scrutiny of all race-conscious programs, including those designed by Congress).

289. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988). Professors Noonan and Gaffney suggest that for all of her disclaim of insensitivity, Justice O'Connor's acknowledgment of the devastating effect of logging on Native American religious practices was still arguably insensitive, given that "[i]n any normal relationship," it is the person impacted by the behavior, rather than the one engaged in the conduct at issue that decides the (in)sensitivity of the behavior in question. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 515 (2001). At any rate, the story here ended on a positive note. Within months after the decision, Congress withheld authorization from the Secretary of the Interior to build the proposed G(asquet)-O(rleans) road, acting under its spending powers. U.S. CONST. art. I, § 8, cl. 1; *see also* Amendments to Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. 100-446, 102 Stat. 1826 (Sept. 27, 1988); H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) ("prohibit[ing] the use of funds for construction of the Gasquet-Orleans (G-O) road in California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction."). It is hard to say whether Congress acted to prevent subsidy from public fund of the private interests of the logging industry or out of a desire to protect the religious freedom of Native Americans. But whatever the motivation, the effect was a more sensitive awareness of the religious needs of Native Americans. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 515–16 (2001).

amounted only to "incidental effects of government programs, which may interfere with the practice of certain religions."[290]

During the course of the opinion, Justice O'Connor's remarked that "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen."[291] The reference to "insensitivity" in the heading tracks or draws on Justice O'Connor's statement. Justice Scalia is rightly rapped as author of the opinion and "crown prince" of the *Smith* Court that took religious freedom away.[292] But it is also true that the opinion was only part of a general environment of "insensitivity to the religious needs" of minorities that predated the issuance of the *Smith* case in 1990. This environment of governmental insensitivity to minority religions was part of the main reason why Native American civil rights, religious, and other opinion leaders, felt apprehension when the Attorney General of Oregon requested Supreme Court review for a second time in the *Smith* litigation and dispute.[293] Also, as legal scholars, such as Professor Jan Pillai of Temple University School of Law, have eloquently argued, the action of the Rehnquist Court in narrowing the scope of Congress's enforcement powers under the Fourteenth Amendment, evident by a case like *Flores*, signifies "[im]proper sensitivity" to the interests, including free exercise of religion, of minorities and other vulnerable groups in our society who are the primary beneficiaries of the rights secured by the Amendment.[294]

Insensitivity to minority religions, in this case, a Native American religion, is a tendency that goes back to the days of the founders of the American republic, who cherished the new country's value of liberty of

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290. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 440 (1988).

291. *Id.* at 453.

292. *See* Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 739 (1987); *see*, e.g., GEY, *supra* note 14, at 861; Laycock, *supra* note 90; ECONOMIST, *supra* note 90; Rabinove, *supra* note 90; Hentoff, *supra* note 23; Yoder, *supra* note 90.

293. *See generally* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 189–193 (The Notably Trials Library 2005) (2001).

294. K. G. Jan Pillai, *In Defense of Congressional Power and Minority Rights Under the Fourteenth Amendment*, 68 MISS. L.J. 431, 517 (1998). Professor Pillai indicates that one way around this insensitivity would have been for the Court to "streamline its blanket claim of interpretive autonomy," in a manner that would "let Congress share the interpretive function under the Amendment, based on some mutually agreeable principles of institutional competence and democratic accountability." *Id.* For example, the Court could "assert primary responsibility to interpret the meaning and scope of the Due Process Clause of the Amendment based on its long familiarity with the concept that is more attuned to the judicial process than to the legislative process." *Id.* But there should be no reason, he said, for the Court to seek to "restrain Congress from enacting enforcement legislation . . . designed to protect the free speech or free exercise rights of minorities from state infringements." *Id.*

conscience, but saw no contradiction in denying that liberty to Native Americans. Thomas Jefferson, who drafted the Virginia Statute for Religious Freedom and shares, with James Madison, honor as principal architect of American religious freedom, well exemplified this habit of mind. In his Second Inaugural Address, Jefferson assured the American people that "free exercise" of religion "is placed by the constitution independent of the powers of the general government," but "in the very next paragraph, lamented that the 'aboriginal inhabitants of these countries' have been misled by those among them who 'inculcate a sanctimonious reverence for the customs of their ancestors' and teach 'that their duty is to remain as their Creator made them.'"[295] Because it does not have the regular trappings of traditional white religion, such as Bibles, creeds, sanctuaries, and hierarchies, white Americans have a tendency to view Native religion as "devil worship" rather than real religion.[296] Epps wrote:

> "[I]f Jefferson had been pressed, he would probably have said that 'free exercise' extended to the Indians; what he would have found incomprehensible is the argument that 'the customs of their ancestors' were anything but a kind of pre-religious vestige destined to be brushed away by exposure to fully developed (that is to say, Western) religious and philosophical concepts."[297]

Contemporary evidence of the same insensitivity to Native religion exists, arguably, in the action of the House of Representatives, commented upon before in this book review, that would overturn the *Smith* rule for all, except practitioners of peyote religion,[298] as well as in the refusal of the coalition of interest groups fighting to restore religious freedom to include protection for peyote religion in their advocacy on the ground that peyote was "controversial."[299] "*Respect* is an important word to Native people. Native ways, Native elders, and Native religion are worthy of

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295. *See id.* at 57. With respect to African Americans, Jefferson is cited for another statement making insensitivity to minority religion an issue of racial discrimination (argued below in Part IV.C.3.). Jefferson authored the Declaration of Independence, which proclaimed, that "all men are created equal," but expressed the belief, that whites were superior to blacks, "inferior by nature, not condition." *See* HANES WALTON, JR. & ROBERT C. SMITH, AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM 6–7 (3d ed. 2006). Professors Walton and Smith, most fittingly, pinpointed Jefferson as "the embodiment of the contradiction in the American democracy between its declaration of universal freedom and equality and its practice of slavery." *Id.* at 8.

296. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 56 (The Notably Trials Library 2005) (2001).

297. *Id.* at 57.

298. *See id.* at 235.

299. *Id.* at 230. Epps remarked appropriately that "[l]ike Gideon in the Bible, the coalition felt the need to send away some of its potential recruits." *Id.*

respect even by those who do not follow them, and the white man has never shown the respect these ways are entitled to."[300]

For all the national features described above, *Smith* is a controversy over deprivation of religious freedom in Oregon that went national. The "trial" confronting religious freedom that formed the title of the book under review is as much a referendum on religious freedom in the American Nation as it is an indication of the nature of religious freedom accorded to adherents of non-mainstream religions in States like Oregon. Recall that the drafters of the Oregon constitution espoused and practiced a political philosophy that revolved around "majority rule," to the relegation of minority rights.[301] Because of this history or in spite of it, Oregon has a long history of discrimination against minority religions. *Smith* was not the first occasion that a controversy over religious freedom originating from Oregon took national stage. Instead, that dubious prize for Oregon goes to *Pierce v. Society of the Sisters*.[302] Decided in 1925, the case involved a campaign by Oregon voters, using a direct legislative initiative to eliminate the right of Oregon's Catholics to maintain their own privately funded parochial schools.[303] In *Pierce,* the Supreme Court ruled the measure unconstitutional and overturned it.[304] The case stands for the proposition that parents have the fundamental liberty to choose how and in what manner to educate their children. In the language of the Court, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[305]

Smith makes clear that *Pierce* is not an aberration, but rather that the culture of insensitivity to minority religion, in the guise of neutrality, is still well and alive in Oregon.[306] One recent policy, in the name of neutrality, exemplifying this insensitivity is an Oregon law that bans public

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300. *Id.* at 108.

301. *See supra* note 216 and corresponding text.

302. 268 U.S. 510 (1925).

303. Pierce v. Soc'y of the Sisters, 268 U.S. 510, 530–33 (1925).

304. *Id.* at 534–36.

305. *Id.* at 535.

306. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 969 (1998) (stating that the "constitutional thread, reaching back to the same convention that framed the law *excluding non-whites from the State*, was an insistence that the State must remain neutral in all religious matters.") (emphasis added); *see also id.* at 970 (noting that "[t]his vision of the state as a 'neutral' force in religion resurfaced in decisions of the Oregon Supreme Court around the time that the *Smith II* case became a live issue").

school teachers from wearing "religious dress" while engaged in their duties.[307] Epps wrote, "[t]he law was originally aimed at Catholic nuns who volunteered in rural communities, but the law's survival into the 1980's formed one constitutional thread that shaped the State's response to Al Smith and Galen Black."[308] What has changed today is that minority religions that were in the past oppressed, like the Catholic Church, have turned arguably "mainstream," leaving new religions, like the Native American Church, today among the "small religious groups that cling to their faith against the secular tide of contemporary society,"[309] as object of discrimination.

3. The Nature of the Relationship Between the First and Fourteenth Amendments that the *Smith* Lawsuit Portrays

The third significance of the book is the nature of the relationship between the First and Fourteenth Amendments that the *Smith* lawsuit portrays. The connection between the two amendments, separated in passage by seventy-seven years,[310] is evident in the fact that the latter incorporated many guarantees of the former, as indicated in the introduction in this book review, and applied them against the States through the Due Process Clause. Although important, this is not the relationship we are interested in here. Instead, it is the connection between racism[311] and religious freedom, specifically the notion that individuals and groups discriminated against can also experience a discrimination directed against their religious practices. Put differently, contempt for the religious practices of individuals and groups discriminated against in society can exist as an extension of the general act of racism against these individuals or groups. It is a connection the Supreme Court itself recognizes. For ex-

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307. *Id.* at 969 (citing OR. REV. STAT. § 342.650 (West 1995)); *see also* Cooper v. Eugene Sch. Dist. No. 43, 723 P.2d 298 (Or. 1986) (where the Oregon Supreme Court held that the state constitution did not protect an experienced public-school teacher who had converted to the Sikh religion and wished to wear a turban on duty).

308. Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 969 (1998).

309. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 166 (The Notably Trials Library 2005) (2001).

310. U.S. CONST. amend. I (ratified in 1791 with the nine amendments which form the Bill of Rights); U.S. CONST. amend. XIV (becoming law when ratified in 1868).

311. *Racism* is "the predication of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over it." *See* HANES WALTON, JR. & ROBERT C. SMITH, AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM 5 (3d ed. 2006) (quoting STOKELY CARMICHAEL & CHARLES HAMILTON, BLACK POWER: THE POLITICS OF BLACK LIBERATION 3–4 (1967)). The ideology of white supremacy or minority inferiority is "the set of ideas used in the United States to justify" racism. *Id.*

ample, in her (dissenting) concurrence in *Smith*, Justice O'Connor noted that "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'"[312] *Church of the Lukumi Babalu Aye v. Hialeah*[313] also embodied these two categories of discrimination,[314] which connection the Supreme Court well recognized in striking down, by an uncommonly unanimous vote, the city ordinances impeding religious practices in the case. Congress made a similar association between discrimination against minority religion and racism when it listed among its findings supporting the passage of the American Indian Religious Freedom Act of 1994, that "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment."[315]

Sometimes religious discrimination and racism can be so interconnected it is hard to see or say where one scourge ends and the other begins. Perception of individuals who view themselves as objects of discrimination can also embody both scourges, as when Al Smith blamed his termination for going to church "on a continuation of being put down, of my people and our religion not being recognized by you newcomers."[316] A similar perception combining the two viruses is embodied in the thought of Galen Black, the white co-plaintiff in *Smith*, who participated in Native American peyote religion and fought fiercely for Native free exercise. Black accused ADAPT of "racist discrimination," believed that whites disrespect Native religion, and blamed his firing and denial of unemployment compensation on the fact that he involved himself with Native Americans and their religion.[317] Most of the instances of insensitivity to minority religions recounted in the discussion in Part IV.C.2, including the statements by Thomas Jefferson, is ineluctably tied to racism.[318] And

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312. Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 901 (1990) (O'Connor, J., concurring).

313. 508 U.S. 520 (1993)

314. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 236 (The Notably Trials Library 2005) (2001) (commenting, describing the facts of the case, that "[a] group of *black* Cuban Americans wanted to build a church in Hialeah, Florida. Most cities welcome most churches, but Hialeah was settled by *white* Cuban Americans, and the church of the Lukumi Babalu Aye was devoted to Santeria, a religion that worships traditional *African* gods and Catholic saints") (emphasis added).

315. 42 U.S.C. § 1996a(b)(a)(5) (2005).

316. *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 251, 277 (The Notably Trials Library 2005) (2001).

317. *See id.* at 107.

318. Note particularly Epps's observation that, "[i]f Jefferson had been pressed, he would probably have said that 'free exercise' extended to the Indians; what he would have

so too may be the observation by Epps, analyzing the evolution of the Native American Church, to the effect that:

> [m]uch of the Christian theology [of the church] was skilled form of camouflage, to shield white society from the knowledge that peyotism was a distinctly Native spiritual tradition. Peyote leaders were careful, too, to keep a low profile, never to challenge authority directly, and to keep Church matters within the group.[319]

When Native Americans wondered aloud "whether the white man's Constitution had room for the[ir] Church," and if it were "time at last to know where Grandfather Peyote stood" in the constitutional scheme of things;[320] when they resolve "to take the[ir] case to the white man's altar of justice and determine once and for all whether the Constitution was big enough to include peyote as well as bread and wine[,]"[321] they spoke simultaneously to the twin problems of religious discrimination and white racism.

V. RECOGNITION RESULTING FROM THIS BOOK

In these days of cuts in funding for academic research, Epps's study on religious freedom was generously supported. To facilitate his research and writing, Epps received five fellowship research grants, coupled with a full-year sabbatical from the University of Oregon School of Law.[322] The book won honorable mention finalist for the American Bar Association Silver Gavel Award in 2002.[323] At the time the book was released in 2001, Epps was an associate professor at the University of Oregon law school. By 2006, he was promoted to the Orlando John and Marian H.

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found incomprehensible is the argument that 'the customs of their ancestors' were anything but a kind of prereligious vestige destined to be brushed away by exposure to fully developed (that is to say, Western) religious and philosophical concepts." *Id.* at 57.

319. *Id.* at 63.

320. *See id.* at 203.

321. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 256–57 (The Notably Trials Library 2005) (2001).

322. *Id.* at 278–79.

323. The American Bar Association Gavel Awards Selection Criteria, http://abanet.org/publiced/gavel/criteria/html (last visited Mar. 30, 2007). The Gavel Award is a "prestigious award" designed to "recognize products in media and the arts" released the year preceding the award year that "have been exemplary in helping to foster the American public's understanding of the law and the legal system." *See id.* Awarded annually since 1958, it is the highest recognition for creativity that the ABA can confer on an individual. *See* The American Bar Association Gavel Awards, http://tarlton.law.utexas.edu/gavel/ (last visited Mar. 7, 2007).

Hollis endowed chair in law. While Epps is a productive scholar,[324] publication and acclaim for his book[325] must have contributed to his success. Did Epps's friendship with Frohnmayer (former law school dean and current university president who recruited Epps) influence Epps's professional achievements? In the book's acknowledgments, Epps, after disclosing his friendship with "[b]oth Al Smith and Dave Frohnmayer," also indicated that Frohnmayer "never tried to influence my views or conclusions about the case, which are substantially different from his own."[326]

VI. CONCLUSION

In *Smith*, the Supreme Court, per Justice Scalia, laid down a rule on "neutral, generally applicable laws" that a vast cross-section of the American society, including civil rights and religious organizations viewed, not incorrectly, as an erosion of religious freedom. The decision marked a negative turnaround in the Court's Free Exercise jurisprudence that, in the wake of *Sherbert* and its progeny, many have begun to assess, here again not incorrectly, as progressive. With *Lyng,* the case also marked a high point in the culture and environment of insensitivity to minority religions that pervaded the Rehnquist Court. After nearly seven decades interpreting the Religion Clauses, counting from *Cantwell*, the Supreme Court's jurisprudence has been contradictory; *Smith* made that record more uneven. The charge relating to free exercise, in the instructive words of the epigraph, which opened this book review, is that we protect this right "whenever we can, by protecting sincere religion in most cases even if we realize that human error will prevent us from protecting it in all cases."[327] Put differently, the task at hand is how "to define and apply consistently a standard for the Religion Clauses that successfully integrates the history, theory, and pragmatic details of modern religious life in this country."[328] The effect of *Smith* and *Flores*, invalidating the RFRA, was to stymie movement toward that goal.

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324. University of Oregon School of Law Faculty, Garrett Epps, http://www.law.uoregon.edu/faculty/gepps/ (last visited Mar. 20, 2007) (listing Epps's publications in the law school's website).

325. In addition to rave reviews, such as the praises embodied in the book's cover, the book also features as readings in classes on the laws of church and state in the United States, of the kind leading to the production of this review book review.

326. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 277 (The Notably Trials Library 2005) (2001).

327. Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 882, *available at* http://www.religion-online.org/showarticle.asp?title=886.

328. STEVEN G. GEY, RELIGION AND THE STATE vi (2d ed. 2001).

The genius of Professor Epps's research, including the book under review, is that, through the medium of a prose-narrative that is, in marked contrast to much legal scholarship, readable and accessible, it eloquently draws attention to this unevenness. But his story on the *Smith* case did not incorporate the RLUIPA. This book review updates that story by incorporating this important law, ruled constitutional by the Supreme Court in *Cutter*. It has also highlighted the importance of the Epps's research in a discussion that, in addition to the obviousness of the insensitivity to minority religions *Smith* spelled, includes a necessary commentary on the nature of the relationship between the First and Fourteenth Amendments that the *Smith* story taught. *To an Unknown God* is an important book on an important case relating to free exercise of religion that should be read by broad cross-sections of the American public, not just individuals like this writer drawn to the topic initially by the exigencies of academic life. The book is a well-researched, well-written, and properly nuanced account that also provides a fair portrait of all the parties involved in the *Smith* lawsuit. Yet, for all its merits, *To an Unknown God* is just one story or account on the *Smith* case that others, such as the protagonist Galen Black, might choose to disagree with. Reprint of the book or a new edition in paperback should make the work even more accessible to a wider audience. For the most intellectual profit, the non-dilettante reader should read the book along with the other output from Epps's research, particularly his law review article on the case, of the same title as the book.

VII. Dates of Key Events Relating to the *Smith* Case

Appendix: Dates of Key Events Relating to the *Smith* Case

1919 Alfred Leo Smith is born on November 6 in Modoc Point, Oregon, to Delia Jackson Smith. His father's name is not recorded. He was born a member of the Klamath tribe, a settled and highly acculturated people who originally lived in South Central Oregon and North Central California. In the first seven years, Smith and his mother lived with his grandmother in a house beside the Williamson River.

1925 The Supreme Court decides *Pierce v. Society of Sisters,* which sustained a challenge by parochial and private schools to an Oregon law requiring children to attend public schools. The case signified an anti-Catholic attempt by Oregon voters during the 1920s, using direct legislation, in this case, the initiative, to eliminate the right of Oregon's Catholics to maintain their own privately funded parochial schools.

1935 The abstinence organization, Alcoholics Anonymous (AA), is founded by Bill Wilson, a former stockbroker who drunk away his career and nearly died of drinking.

1940 David Frohnmayer is born on July 9, in Medford, southern Oregon.

1947 Galen W. Black is born in Russell, Kansas, on October 1 to Caucasian parents.

1949 The Hoover Commission recommends "termination," which would mandate that Congress no longer recognize Indian sovereignty, thus eliminating all special rights and benefits.

1953 Wyoming Representative William Henry Harrison introduced, and Congress passed, a law giving California, Minnesota, Nebraska, Oregon, and Wisconsin legal jurisdiction over Indian reservations, thus initiating the termination process.

1968 Congress passes the American Indian Civil Rights Act, giving individual Indians constitutional protection against their tribal governments. This protection is the same as the protection the U.S. Constitution provides against state and local governments.

1968 The American Indian Movement (AIM), a protest movement modeled after the Black civil rights movement, is founded.

1969 Indian activists occupy Alcatraz Island near San Francisco, in addition to staging sit-ins at the Bureau of Indian Affairs.

1970 Frohnmayer marries Lynne Diane Johnson. The couple bore five children: Kirsten (born 1973), Mark (1974), Katie (1979), Jonathan (1985), and Amy (1987). Two of these children, Katie, and Kirsten, died in 1991, and 1997, respectively, of complications from Fanconi Anemia, a life-threatening genetic disorder.

1971 The Alaskan Native Claims Settlement Act is passed. The Act eliminates 90 percent of Alaskan Natives' land claims in exchange for a guarantee of 44 million acres and almost $1 billion.

1971 Frohnmayer accepts appointment to teach law at the University of Oregon Law School in Eugene. He holds the position until 1975 when he was elected to the Oregon House of Representatives.

1975 Frohnmayer is elected to the Oregon House of Representatives.

1976 The Federal government "terminates" its recognition of Klamath tribe's sovereignty.

1979 The United States Supreme Court awards the Lakota Nation $122.5 million in compensation for the United States government's illegal appropriation of the Black Hills in South Dakota.

1979 Smith attends a Native American ceremony at Makah Reservation in northwestern Washington where he took the peyote sacrament in dry form, "approximately two tablespoons." Over the next five years, he participated in numerous peyote religious ceremonies in Oregon and elsewhere.

1980 Smith, then 60, marries Jane Farrell, then 27, a Caucasian woman from Pennsylvania. The couple bore a child, Kaila, born in July 1982.

1980 Frohnmayer wins election as attorney general of Oregon.

1982 Galen Black and Alfred Smith accept appointment as counselors with the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a small local alcohol and drug treatment facility located in Roseburg, Oregon, at the time initiating a systematic outreach to Native Americans, the largest minority population in Douglas County. The two later lost their positions for using peyote in Native American religious services, Black in 1983, and Smith in 1984.

1983 Galen Black attends a Native American Church service where he took peyote as sacrament.

1986 Justice William J. Brennan Jr., publishes his article, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y. Univ. L. Rev. 535 (Oct. 1986), where he suggested that the golden age of federal civil-liberties litigation was over.

1986 Federal government "termination" of Klamath tribe is ended and recognition reinstated. However, Klamath land was not returned, even though tribal members were once again eligible for Indian services.

1988 Congress officially repeals the thirty-five-year-old termination policy.

1988 Frohnmayer is re-elected as Oregon's attorney general.

1990 The Supreme Court decides *Employment Division v. Smith*, which ruled that "neutral, generally applicable laws" that have an inci-

dental effect on religious practices do not have to be subjected to strict scrutiny.

1990 Frohnmayer runs for election as governor of Oregon and loses to Barbara Robert, a Democrat, by 67,000 votes.

1991 The Oregon Legislative Assembly amends Oregon's Controlled Substances Act to exempt from prosecution the use and possession of peyote for religious ceremonies.

1991 David Frohnmayer resigns his position as attorney general of Oregon to become Dean of the University of Oregon School of Law.

1993 Congress enacts the Religious Freedom Restoration Act (RFRA) restoring strict scrutiny in "neutral generally applicable laws" that substantially burdens religious practices.

1993 President Bill Clinton appoints Ada Deer as assistant secretary for Indian affairs. She is the first Indian woman to hold the position.

1994 David Frohnmayer becomes president of the University of Oregon.

1994 Three hundred representatives from the 545 federally recognized Indian tribes meet with President Clinton. This marks the first time since 1822 that Indians have been invited to meet officially with a U.S. president to discuss issues of concern to Indian people.

1994 Congress enacts the American Indian Religious Freedom Act (AIRFA), allowing the use of peyote in Native American religious ceremonies.

1996 The University of Arizona creates the first Ph.D. program in American Indian studies.

1997 The Supreme Court decides *City of Boerne v. Flores*, which ruled the RFRA unconstitutional as applied to the States.

1998 Garrett Epps publishes an article in the Arizona State Law Journal, titled, *To an Unknown God: The Hidden History of* Employment Division v. Smith, the result of his research on the *Smith* case.

2000 Congress enacts the Religious Land Use and Institutionalized Persons Act (RLUIPA) dealing with the protection of land use as religious exercise, and protection of religious exercise of institutionalized persons (such as individuals in prisons and nursing homes).

2001 Garrett Epps publishes his book on religious freedom titled *To an Unknown God.*

2005 The Supreme Court decides *Cutter v. Wilkinson*, constitutionalizing section 3 of the RLUIPA, the section dealing with protection of religious exercise for individualized persons.

Sources: Adapted from the various sources used in this book review and acknowledged in the footnotes, plus PAULA D. MCCLAIN & JOSEPH STEWART JR., "CAN WE ALL GET ALONG?": RACIAL AND ETHNIC MINORITIES IN AMERICAN POLITICS 191-99 (2006).